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United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TOMMY PAYNE,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3897

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THE UNITED STATES OF AMERICA,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Names and Addresses of Counsel.

THOS. P. REVELLE,
U. S. District Attorney,
Federal Building, Seattle, Washington,
W. W. MOUNT,
Assistant U. S. Attorney,
Federal Building, Tacoma, Washington,
Attorneys for Appellant.
ARTHUR E. GRIFFIN,
1219–21 Alaska Building, Seattle, Washington,
ARTHUR R. GRIFFIN,
1219–21 Alaska Building, Seattle, Washington,
Attorneys for Appellee. [1*]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Bill of Complaint—Petition.

To the Honorable Judges of the Above-entitled Court, Sitting in Equity.

The plaintiff complains of the defendant and for cause of action alleges and says:

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*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That the plaintiff is and at all times since his birth has been a full blood Indian, residing upon the Quileute Reservation in this District, and a member of the Quileute Tribe of Indians.

II.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is a full blood Quileute Indian and a member of the Quileute Tribe of Indians, born and residing upon the Quileute Reservation in this District. That the plaintiff is entitled under the treaty made and entered into between the United States and the Quileute Indians and other bands of Indians, and under the Allotting Acts of the United States to an allotment of at least 80 acres of land upon the Quinaielt Reservation in the State of Washington, and within this District. The jurisdiction of the court further depends upon the acts of August 15, 1894, 28 Statutes at Large 305, and is amended by the [2] act of February 6, 1901, 31 Statutes at Large 760, giving the right to Indians to bring suits against the United States to establish their rights to an allotment of land.

III.

That plaintiff is the head of the family consisting of the plaintiff's wife and three children.

IV.

That about nine years ago the plaintiff duly selected for allotment with the assistance and approval of the then allotting agent of defendant for

said Quinaielt Reservation, the following described land as his allotment, described as follows, to wit:

> M. 45, The West one-half (½) of the Northwest quarter (¼) of Section 26, Township 23, North of range 13 W., containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington.

and that ever since said land was so selected by plaintiff, the plaintiff is informed and believes, that the same has been held for the plaintiff, and that all other persons and Indians have been excluded therefrom.

V.

That the land described is unalotted, unimproved, vacant, Indian lands subject to selection and allotment, under the laws of the United States and plaintiff is lawfully entitled to have said land allotted to him.

VII.

Notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiff from [3] said land and have refused and still refuse to let plaintiff go upon or reside upon said land or any portion thereof.

VII.

That plaintiff is entitled to have said land so selected allotted to him and desires that the same be allotted to him and that his rights be recognized and

that he be permitted to go upon, live upon, cultivate and improve said land as his home.

VIII.

That plaintiff waives answer under oath.

WHEREFORE, plaintiff prays judgment as follows:

1. That a judgment and decree be entered herein as provided by law in favor of this claimant to said 80 acres of the said land hereinbefore described, and that said decree be properly certified by the Secretary of the Interior, and that the plaintiff be awarded said lands as his allotment and that he be adjudged and decreed to have full right, power and authority to go upon, live upon, cultivate and improve the said land as his home in all respects as provided by law.

2. That the plaintiff have all other and further relief as is equitable and just.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff. [4]

State of Washington,
County of King,—ss.

Tommy Payne, being first duly sworn, upon oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing petition, knows the contents thereof and the same is true as he verily believes.

[Thumb print] TOMMY PAYNE.

Subscribed and sworn to before me this 2d day of October, 1920.

[Notary Seal] ARTHUR E. GRIFFIN,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

[Indorsed]: Filed in the United States District Court Western District of Washington, Southern Division. Oct. 29, 1920. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [5]

United States District Court Western District of Washington, Southern Division.

No. 111-E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Answer.

To the Honorable Edward E. Cushman, Judge of the Above-entitled Court, Sitting in Equity:

Comes now the above-named defendant, the United States of America, by Robt. C. Saunders, United States Attorney, for the Western District of Washington, and in answer to the petition of the plaintiff, Tommy Payne, in the above-entitled cause admits, denies and alleges as follows:

I.

Answering paragraphs I, II and III of said pe-

tition, this defendant, for lack of knowledge, information or belief as to the matters and things therein contained, denies the same and each and every allegation thereof.

II.

Answering paragraph IV of said petition, this defendant denies the same and each and every allegation thereof and alleges the facts to be that the land mentioned and described in said petition is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes. [6]

III.

Answering paragraph VI of said petition this defendant denies the same and each and every allegation thereof, and alleges the facts to be that the said defendant rightfully refused to allot the said land to the plaintiff, or to issue to the plaintiff any trust or fee patent therefor, and has denied and excluded, and still denies and excludes the plaintiff from said land, and has refused and still refuses to let plaintiff go upon, or reside upon, said land, or any portion thereof.

IV.

Answering paragraph VII of said petition, this defendant denies the sam*d* and each and every allegation thereof.

WHEREFORE, this defendant prays that the plaintiff go hence, and that the defendant have judgment for its costs and disbursements, and for

such other and further relief as to this Honorable Court may appear just and equitable.

ROBT. C. SAUNDERS,
United States Attorney.
J. M. BOYLE, Jr.,
Assistant United States Attorney.

Received a copy of the within Answer this 28th day of March, 1921.

GRIFFIN & GRIFFIN,
Attorneys for Pltf.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Mar. 29, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [7]

In the United States District Court for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Demurrer.

Comes now the plaintiff and demurs to the affirmative matter set forth and contained in the defendant's answer, for the reason and upon the ground that said affirmative matter in said answer does not state facts sufficient to constitute a defense,

and does not state facts sufficient to prevent the plaintiff from having and recovering the relief set forth and demanded in his complaint and petition herein.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. July 15, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [8]

In the District Court of the United States Western District of Washington, Southern Division.

No. 111-E—IN EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Filed: July 28, 1921.
GRIFFIN & GRIFFIN,
For Plaintiff,
Hon. ROBT. C. SAUNDERS,
United States Attorney,
Hon. J. M. BOYLE, Jr.,
Asst. United States Attorney,
For Defendant.

CUSHMAN, District Judge—Under the Act of August 15, 1894, (28 Stats. at L. Chap. 290, page

305,) as amended by the Act of February 6, 1901, (31 Stats. at L., chap. 217, page 760) (Comp. Stats. 4214), plaintiff, a full blooded Indian of the Quileute Tribe, the head of a family consisting of a wife and three children, sues for an allotment of eighty acres of land in the Quinaielt Reservation, which he alleges he selected nine years ago with the assistance and approval of the then allotting agent.

The defendant has answered, alleging, among other things:

> " * * * that the land mentioned and described in said petition is not such land as is or would be available for agricultural or grazing purposes, but is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes."

A demurrer has been interposed to this defense by the plaintiff. [9]

The treaty with the Quileute and Quinaielt Indians, made July 1, 1855, provides:

> "Article 5. To enable the said Indians to remove to and settle upon such reservation as may be selected for them by the President, and to *clear,* fence, and break up a sufficient quantity of land for cultivation, the United States further agrees to pay the sum of two thousand five hundred dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

"Article 6. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted by it, remove them from said reservation or reservations to such other suitable place or places within said territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands, in which latter case the annuities, payable to the consolidated tribes respectively, shall also be consolidated; and he may further, at his discretion, cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable. Any substantial improvements heretofore made by any Indians, and which they shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made accordingly therefor." (12 Stats. 971.)

Article VI of the treaty with the Omahas, concluded at Washington City, March 6, 1854, above referred to, provides:

> "The President may, from time to time, at his discretion, cause the whole or such portion of the land hereby reserved, as he may think proper, or of such other land as may be selected in lieu thereof, as provided for in Article first, to be surveyed into lots, and to assign to such Indian or Indians of said tribe as are willing to avail of the privilege, and who will locate on the same as a permanent home, if a single person over twenty-one years of age, one-eighth of a section; to each family of two, one-quarter section; to each family of three and not exceeding five, one-half section; to each family of six and not exceeding ten, one section; and to each family over ten in number, one-quarter section for every additional five members * * * (10 Stats. 1043). [10]

The Court will take judicial notice of the fact that the Quinaielt Reservation was at the time of the treaty and its establishment, a timbered area, and, save as since cleared, so remains. It is to be noted that Article V of the treaty with the Quileutes appropriated $2500 to be expended, in part, to "clear" land upon it for cultivation. This must have contemplated clearing it of timber.

Section 1 of the allotment act of February 8, 1887, as amended, provides:

> "In all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by

> treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof, to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. * * * (Sec. 4195 Comp. Stats.)

If the act is necessarily inconsistent with the treaty, it, to that extent, supersedes the treaty; but it is the duty of the Court to give full effect to both where it can reasonably be done. This is true in the case of statutes and, for stronger reasons, it must be true where a modification of a treaty is claimed to have been effected by a later statute, for a treaty is *quasi* contractual in its nature. Citation of authority upon these propositions is deemed unnecessary.

By this section, the discretion of the President or Secretary in the particular in question is limited to determining, before surveying a reservation or a part of it, that it "may be advantageously utilized for agricultural or grazing purposes by [11] such Indians." It is not claimed that the Reservation has not been surveyed, and from the complaint it

would appear that the portion of it now in question had been.

The right given the President and the duty outlined are controlled by the character of the land to be surveyed. The discretion vested in the President of allotting to the individual Indian lands "in such area as, in his opinion may be for their best advantage, not to exceed 80 acres, etc.," contemplates a discretion in determining the amounts to be allotted and places the limit on such amount, which is less than that provided by the treaty. While the foregoing authority is given the President to consider and determine the character of the land in fixing the size of the allotment, no right is given by this section to refuse an allotment of selected, surveyed land because the lands are more valuable for timber than agriculture or grazing.

In United States vs. Fairbanks (171 Fed. 337) the Circuit Court of Appeals of the Eighth Circuit in considering this provision, said:

> "the acts of 1887 and 1889 were confined to lands that were 'advantageous for agricultural and grazing purposes.' The department, in construing this language, ruled that lands which were chiefly valuable for the pine timber growing thereon, did not come within the statute. Such lands had therefore been excluded from allotment. The Steenerson act abrogated this limitation. The agent was not aware of this feature of the Steenerson act, and for that reason held that the Mooers application for the lands in question were valid, and permitted the second

filing. The trial court was also of the opinion that, inasmuch as the Steenerson act first gave a right to the allotment of pine lands all persons claiming such allotments should be treated alike, and that no allotment of such lands be made until the agency was ready to begin the work of making additional allotments under the Steenerson act. We think this ruling was erroneous. The regulation of the department excluding timber lands from the benefit of the statutes of 1887 and 1889 was itself questionable. A very [12] large portion of the area of the United States at the present time developed to agriculture was originally timber land. * * *

(Act p. 340)

Leecy vs. United States, 190 Fed. 289.

The Fairbanks case was affirmed by the Supreme Court (223 U. S. 315) without discussing the particular question here involved. The Steenerson act, spoken of by the courts has no application to the lands now in question.

The demurrer to this defense is sustained; but, on account of the broad denials of the answer, the demurrer to the answer as a whole is overruled.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 20, 1921. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [13]

In the District Court of the United States, Western District of Washington, Southern Division.

No. 111–E—IN EQUITY.

TOMMY PAYNE,

Complainant,

vs.

UNITED STATES OF AMERICA,

Defendant.

Memorandum Decision on the Merits.

Filed: January 19, 1922.

GRIFFIN & GRIFFIN,
For Complainant,
Hon. THOS. P. REVELLE,
U. S. District Attorney,
Hon. W. W. MOUNT,
Assistant District Attorney,
For Defendant.

CUSHMAN, D. J.—The evidence taken and the arguments, oral and written, but confirmed my belief in the correctness of the ruling herein made upon the demurrer to the answer.

In 1885, the lands here in question, with other lands, were reserved for the Indians of the Quinaielt and Quileute Tribes, with provision and promise made for their allotment. The Indians were, in effect, told that the Government thought it best to allot the lands in severalty that they might have homes and better learn to cultivate the soil.

To carry out this beneficent purpose, in exchange for a vast and rich heritage of lands released by the Indians, the Government reserved for them a small parcel of land in a remote wilderness. It was covered with timber, which was then valueless. [14] The land, itself, was not rich, but rough, stony and of a light soil at the best. The timber being of no value, and the lands of little worth, there was no way to defray the expense of clearing the land, which, with timber such as that upon the land, is very heavy.

The opportunity of taking fish from the ocean, afforded by the location, was, probably, all that enabled the Indians to exist near this "cod's head" that had been so generously given them for the "salmon's tail."

Now, after nearly seventy years, when all who heard Governor Stevens make these promises are dead, because, forsooth, the timber on an allotment has become of sufficient value to enable the descendants of the credulous ones, who listened to those ancient tales, to pay for the clearing of the lands and the making of some kind of a home thereon, the fact that the timber has become more valuable than the lands is made the excuse for a refusal to carry out that old promise. It is said the timber on this claimed allotment is worth $3900. In seventy years, $4,000 would be produced by less than $500 at six per cent, compounded annually.

The Government's evidence shows that:

> "there are but a very few allotments (already made) on this reservation on which the timber

value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value."

No explanation is given of why allotments should have been made to the Quinaielt Indians, under substantially the same conditions, and allotments refused the plaintiff and other Quileutes.

Decree is for complainant as prayed. [15]

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [16]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Decree.

This cause came duly and regularly on to be heard in open court before Honorable Edward E. Cushman, one of the Judges of the above-entitled court upon the motion of the plaintiff for a decree upon the findings of fact and conclusions of law

heretofore made and entered herein, and the Court being fully advised, grants said motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT, That the plaintiff, Tommy Payne, be and he hereby is entitled to the lands heretofore selected by said plaintiff, situated upon the Quinaielt Indian Reservation, within this District, in the State of Washington, to wit: The West One-Half (W½) of the Northwest Quarter (NW ¼) of Section 26, Township 23 North of Range 13 West of Willamette Meridian, containing 80 acres, more or less, and being the portion of the said Quinaielt Reservation, as an allotment to be owned and held by the said plaintiff, in all respects as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendant, its officers and agents, be and they hereby are ordered and directed to issue to said plaintiff a certificate of allotment for said lands hereinbefore described, said certificate of allotment to be in effect and to award to the said plaintiff all of the rights to which said plaintiff is entitled under and by virtue of the laws of the United States. [17]

IT IS FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT, That the defendant, its officers and agents, and all persons claiming by, through or under them, be and they hereby are forever barred and estopped from ever claiming or asserting that said plaintiff, his heirs, executors, administrators, and assigns, are not entitled to said lands, as and for his allotment, with

full right to use, build upon, clear, improve and occupy the same, in all respects as provided by law.

Done in open court this 26th day of Jan. A. D., 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [18]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Findings of Fact and Conclusions of Law.

This cause came duly and regularly on to be heard in open court before Honorable Edward E. Cushman, one of the Judges of the above-entitled court. The plaintiff appeared in person and by Arthur E. Griffin, his attorney, and the defendant appeared by Thomas P. Revelle, District Attorney, and W. W. Mount, Assistant District Attorney. Evidence was duly and regularly introduced for

and on behalf of the plaintiff and defendant, and the Court being fully advised, makes the following

FINDINGS OF FACT.

I.

That the plaintiff now is and at all times since his birth has been a full blooded Indian, residing upon the Quilleute Reservation in this District, and a member of the Quilleute Tribe of Indians.

II.

That the grounds upon which the court's jurisdiction depends are as follows: That the plaintiff is a full blood Quilleute Indian and a member of the Quilleute Tribe of Indians, born and residing upon the Quilleute Reservation of this District. That the plaintiff is entitled under the treaty made and entered into between the United States and the Quilleute Indians and other bands of Indians, and under the Allotment Acts of the United States to an allotment [19] of at least 80 acres of land upon the Quinaielt Reservation in the State of Washington, and within this District. The jurisdiction of the court further depends upon the acts of August 15, 1894, 28 Statutes at Large 305, and is amended by the act of February 6, 1901, 31 Statutes at Large 760, giving the right to Indians to bring suit against the United States to establish their rights to an allotment of land.

III.

That plaintiff is the head of the family consisting of the plaintiff's wife and three children.

IV.

That about ten years ago the plaintiff duly se-

lected for allotment with the assistance and approval of the then allotting agent of defendant for said Quinaielt Reservation, the following described land as his allotments, described as follows, to wit:

> M. 45, The West one-half (½) of the Northwest Quarter (¼) of Section 26, Township 23, North of Range 13 W., containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington.

and that ever since said land was so selected by plaintiff, the plaintiff is informed and believes, that the same has been held for the plaintiff, and that all other persons and Indians have been excluded therefrom, and plaintiff desires to go upon said land with himself and family, and to clear the same, and to make his home upon said land so selected.

V.

That the land described is unallotted, unimproved, vacant, Indian lands subject to selection and allotment, under the laws of the United States and plaintiff is lawfully entitled to have said land allotted to him.

VI.

Notwithstanding all of the facts hereinbefore alleged the defendant, its officers and agents have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to [20] the plaintiff any trust or fee patent therefor, and have denied and excluded and still deny and exclude plaintiff from said land, and have refused and still re-

fuse to let plaintiff go upon or reside upon said land or any portion thereof.

Done in open court this 26th day of Jan., A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

And from the foregoing findings of fact, the Court makes the following

CONCLUSIONS OF LAW.

I.

That the plaintiff is entitled to a decree herein adjudging and decreeing that the plaintiff duly selected the lands described in paragraph 4 of the plaintiff's Petition, and is entitled to a Decree adjudging and decreeing that said plaintiff is entitled to said land so described, and all portions thereof, for his allotment, and is entitled to have said land allotted to him by the defendant, its officers and agents.

II.

That the plaintiff is entitled to the immediate possession of said lands, and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the treaty made and entered into by the United States and said Quilleute Tribe and Band of Indians.

III.

That the plaintiff is entitled to a decree estopping

the defendant, its officers and agents from hereafter interfering with the plaintiff in his right to the possession of said lands and his [21] right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve and build upon said land.

Done in open court this 26th day of Jan., A. D. 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jan. 27, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [22]

United States District Court, Western District of Washington, Southern Division.

No. 111–E—IN EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Defendant's Exceptions.

Comes now the above named defendant, United States of America, by its attorneys, Thomas P. Revelle and W. W. Mount, and respectfully excepts

to the decree heretofore made and entered by the Court in the above-entitled cause.

This exception is based upon the ground and for the reason that the property described in the plaintiff's bill of complaint and selected by the plaintiff for allotment is not such land as is suitable for agricultural or grazing purposes as provided by the statute, but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

THOMAS P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney.

The foregoing exception is hereby allowed this 17th day of May, A. D., 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 18, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [23]

United States District Court Western District of Washington Southern Division.

No. 111–E—In EQUITY.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Petition and Appeal.

Comes now the above-named defendant, the United States of America, through its attorneys, Thos. P. Revelle and W. W. Mount, feeling itself aggrieved does hereby appeal from the judgment and decree signed and entered in the foregoing cause on the 19th day of January 1922 in the District Court of the United States for the Western District of Washington, Southern Division, and from each and every part thereof and does herewith present its several assignments of error and does hereby pray the allowance of said appeal and that so much and such portions of the record, the statement of facts and exhibits as may be necessary to execute said appeal be forwarded from said Court by the Clerk of the District Court of the United States for the Southern Division of the Western District of Washington, duly certified and authen-

ticated under the seal of the said trial Court to the Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney.

Due receipt of a copy of the foregoing Petition and Appeal is hereby acknowledged this 16th day of May, 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court Western District of Washington Southern Division May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [24]

United States District Court Western District of Washington Southern Division.

No. 111-E—In EQUITY.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Assignments of Error.

Comes now the above-named defendant, the United States of America, by and through its attorneys, Thos. P. Revelle and W. W. Mount, and re-

spectfully submits the following assignments of error upon which it relies as supporting its appeal from the Judgment and Decree entered on the 19th day of January 1922 in said cause in the District Court of the United States for the Southern Division of the Western District of Washington and under which assignments of error said appellant seeks reversal of the Decision, Judgment and Decree of said trial Court:

I.

That the District Court erred in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

II.

That the District Court erred in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States [25] and that the plaintiff is lawfully entitled to have such land allotted to him.

III.

That the District Court erred in finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the

plaintiff any trust or fee patent therefor.

IV.

That the District Court erred in adjudging that the plaintiff was entitled to a decree adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

V.

That the District Court erred in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the Treaty made and entered into by the United States and Said Quilleute Tribe and Band of Indians. [26]

VI.

That the District Court erred in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his rights to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not

entitled to go upon, clear, improve and build upon said land.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Defendant.

Due receipt of copy of the foregoing assignments of error is hereby acknowledged this 16th day of May 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Indorsed]: Filed in the United States District Court Western District of Washington, Southern Division. May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [27]

United States District Court Western District of Washington Southern Division.

No. 111–E—In EQUITY.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Allowing Appeal.

BE IT REMEMBERED that this matter came on duly for hearing on the petition of the United

States, through its attorneys, Thos. P. Revelle, and W. W. Mount, for the allowance of its petition in appeal in the foregoing entitled cause from the decision of this Court made and entered on the 19th day of January, 1922, and the said appeal being from said Decision to the Circuit Court of the United States of America for the Ninth Circuit; and this Court being fully advised in the premises.

IT IS HEREBY ORDERED that the said appeal be allowed as prayed for and the Clerk of this Court is hereby directed to formulate a true copy of the transcript of the records and proceedings to the extent necessary to properly present said appeal together with exhibits and other matters of record and the memorandum decision and formal Decree of this Court, all duly authenticated, and send same to the said Circuit Court of Appeals for the Ninth Circuit.

Done in open Court this 16th day of May 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. May 17, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [28]

United States District Court Western District of Washington Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to March 20, 1922, to File Bill of Exceptions.

This matter coming on to be heard before the Honorable Edward E. Cushman, Judge of the above-entitled court, on motion of the above-named defendant, the United States of America, by Thos. P. Revelle, United States Attorney for the Western District of Washington, for an order extending the time within which to file a bill of exceptions in the above-entitled case for a period of sixty days from the nineteenth day of January, 1922, and the Court being fully advised in the premises, now therefore.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be allowed until the twentieth day of March, 1922, in which to file a bill of exceptions in the above-entitled cause.

Done in open Court this 30th day of January, 1922.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Filed in the United States of America Western District of Washington, Southern Division. Jan. 30, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [29]

United States District Court Western District of Washington Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to May 19, 1922, to File Bill of Exceptions.

This matter coming on to be heard before the Honorable Edward E. Cushman, Judge of the above-entitled court, on motion of the above-named defendant, the United States of America, by Thos. P. Revelle, United States Attorney for the Western District of Washington, for an order further extending the time within which to file a bill of exceptions in the above-entitled case for a period of sixty days from the twentieth day of March, 1922, and the Court being fully advised in the premises, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendant be allowed

until the nineteenth day of May, 1922, in which to file a bill of exceptions in the above-entitled cause.

Done in open Court this 16th day of March, 1922.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Filed in the United States District Court Western District of Washington Southern Division, Mar. 16, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin Deputy. [30]

In the United States District Court, for the Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff

vs.

UNITED STATES OF AMERICA,
Defendant.

Plaintiff's Proposed Statement of Evidence.

Comes now the above-named plaintiff and respondent by Arthur E. Griffin, his attorney, and submits the following as a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendant and appellant, from the decree entered herein against the defendant and in favor of the plaintiff:

Testimony of Tommy Payne, for Plaintiff.

TOMMY PAYNE testified that he is a full blooded Indian of the Quileute Tribe, born and raised on the Quileute Reservation, and now fifty-five years of age. He has a family consisting of a wife and five children.

That the Quileute Reservation is about one mile square, and about two hundred Indians live on it. The village on the reservation is called La Push. The Indian name of his father was Tah-ah-ha-wht'l, who was the same man who signed the treaty for the Quinaielt and Quileute Indians with Governor Stevens, July 1st, 1855.

That the Quinaielt Reservation was surveyed about twelve years ago, at which time he selected on this Reservation an eighty acre tract of land for allotment, more particularly described as follows:

> "M. 45. The West one-half (W ½) of the Northwest quarter (NW ¼) of Section 26, Township 23 North of range 13W.; containing 80 acres, the same being a portion of the Quinaielt Reservation, within the District of Washington."

This selection was made through Mr. Archer, at that time the allotting agent for the Government. Mr. Archer [31] instructed his assistant to go and see the plaintiff together with the rest of the people that were entitled to an allotment at that time, and they showed plaintiff maps and locations of where there was good lands for agricultural purposes; that is howe he got this. They took his

(Testimony of Tommy Payne.)

name and it is recorded with the land that he selected there. That it is the desire and intention of the plaintiff to go upon that land and make it his home as soon as he is permitted to do so by the government officials. The land selected is part of the Quinaielt Reservation in this State.

Concerning the character of the land selected, the plaintiff testified that about half the land is heavily timbered with cedar and hemlock, and the remainder bottom land with clay soil. The character of the land is very similar to all the lands along the Raft and Queets River, which is mostly bottom land, clay soil. Part of the land is open along that bottom. That if the timber were removed it would make good agricultural land. That it is necessary now that the Indians should have agricultural lands in order to support their families because they are having a hard time to support their families on account of their fish getting played out, and the seal hunting getting very poor and all other things along the river where they used to make their living has gotten so that they are restricted from getting the fish and making their living, which is why it is necessary for them to all move over to their allotment if they are given their right. That the plaintiff has supported his family on fishing and sealing and hunting, but those things are all played out, and in a few years they do not not know what they are going to do. That the Indians used to hunt sea otter years ago, but that is all gone. These big purse seine com-

(Testimony of Tommy Payne.)

panies have gotten so thick now that the Indians' fish that used to be in the water are pretty [32] nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation.

That plaintiff feels sure he can support his family if given the right to that land; that both white people and Indians along the Queets River are making a good living to-day out of their farms along the river, and the Queets River is about six miles from the land plaintiff selected, and also the Raft River. Indian canoes can go in the Raft River at any time, and a boat that would draw eight feet can enter the Raft River at high tide.

That was about 12 years ago that plaintiff made this selection, at the time they were surveying, and this land had been surveyed when he took up this selection. That the nearest settlement to this land is a settlement called Queets where there is a large cannery and store. That plaintiff has always been willing and anxious to go upon the allotment and live upon it as an allotment. That plaintiff is seeking this allotment for himself, to hold permanently, but that his small children he expects to take care of and support while under his care, if he is allowed to go upon this allotment. At this point counsel for plaintiff, this respondent, introduced the third paragraph of defendant's answer as going to prove the fact that the Government had excluded him from the land, which was admitted by the Court.

Testimony of Joe Pullen, for Plaintiff.

Joe Pullen, an Indian of the Quileute Tribe who has also made a selection, testified that the locality where Tommy Payne had made his selection was partly bottom land and fit for agricultural purposes in some place, but a little further in it is kind of heavy timber, pretty hard to clear, but not what you would call timber land, though there is some timber on it. That the soil is clay soil, and the portion where it is the most heavily timbered would be good for grazing or agriculture with the timber removed. That the land is not all bottom land but is brushy land. [33] The witness characterized a part of the land as "brushy," about one-third of the tract as fit for agriculture and the timbered area as containing some merchantable timber.

On cross-examination the witness testified that he had gone over the Raft River country, and also the Queets and Quinaielt River country, but did not know exactly the location of the land in question, though he had gone along a creek, Red River, and both sides of it were kind of level land; that he had been up the Raft River once, and had passed through the land between the Raft River and the Red River, but not further in. That nearly all the land going up the river is bottom land and one can tell that one-third of the 80 acres is bottom land, but further in is kind of heavy timber, as

(Testimony of Jack Ward.)

it is always that way in creeks, not big rivers; that witness thought he must have passed through that land if it is close to that red river.

Testimony of Jack Ward, for Plaintiff.

Jack Ward, also a member of the Quileute Tribe of Indians, testified he had known plaintiff all his life; that he had lived at Quileute, and that the testimony in regard to the fish being depleted in the ocean and the rivers in the neighborhood of the Quileute Reservation, and the number of people on that reservation, was true. That the witness had been in the locality of the land selected by Tommy Payne several times; that the land is the same as around the Queets country where the farmers live; that he would say pretty near one-half of that selection was good for agricultural land, and the other half toward the hill is timber, and if the timber were removed would be about the right kind of land for agriculture, and grazing. That he should judge about 30 acres of this selection is open-like and brushy, and the other fifty is where the timber lies. That he had been up in the Queets country which [34] is about six miles from the Raft river, the biggest part of which is inside the reservation, where the Indians have cleared their land and live on it to make a living there. In the Queets River there are about eight Indian families and right across the river there are over twenty white families. That one farmer living right across from one of the Indian farms

(Testimony of Jack Ward.)

has about 40 head of cattle and has cleared about sixty acres of his ranch, and the land in the Raft river territory, including the land Mr. Payne selected, is as good, and of the same character, as the land where the eight Indian families and twenty white families have cleared land.

That the Quinaielt Indians have lands upon that reservation, and that some of the Quileutes have been allotted, but a great majority of the Quileutes have been refused their allotments.

Not all of the land selected by Mr. Payne is suitable for agriculture now. Most of those lands in that valley were just like the one Mr. Payne selected, and now they have big farms out of it.

That the witness had been on Tommy Payne's selection a year ago this last fall (the fall of 1920), but did not remember how many times he had been upon it; that he had hunted through that part of the country; that he did not know the location of the land by the posts, but had been around that vicinity and over that Raft River. That there might be a few hemlocks besides spruce and cedar, but that he did not know about fir.

The evidence submitted on behalf of the Government is contained in a letter addressed to the Commissioner of Indian Affairs signed by Superintendent Eugene W. Hill of Taholay, Washington, and introduced in evidence as Defendant's Exhibit "A", which letter is as follows: [35]

Defendant's Exhibit "A".

"LOCATION.—This tract of land lies on Raft River and about two or two and one-half miles from the mouth of the River. A poor and very slightly used foot trail goes through the tract and is the only means of getting to this or any of the adjacent land. The nearest habitation of any sort is upon the Queets River, about 8 miles distant from the tract and is reached by going along the beach. There is no road of any sort between Raft River and the Queets. Raft River is about 11 miles from Taholah and is reached by going up the beach at low tides and crossing the bluffs on very poor trails which are almost impassable more than half of the year. Very small gas boats (30 feet or so in length) can enter Raft River at high tide and with a quiet sea but the river is too small and shallow to permit of large boats entering or of small boats entering at any but full tides."

"LAND.—About 30 acres of the land consists of level and fairly rich bottom which would, if cleared, make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would, if cleared, make grazing and possibly farm land. The land is all heavily timbered, however, and clearing such land would cost from $150 to $250 per acre, and situated as it is the land when cleared could probably scarce pay for the taxes."

"TIMBER.—The timber on the area consists of a mixed stand as shown by the cruise below, the

cedar predominating. As in the case of timber near the salt water it is not of the best quality, but it is all sound, of good quality (not best) and it is not at present deteriorating."

	NW¼	NW¼; SW¼	NW¼.	Totals
Cedar	474000	272000	746000	board feet
Spruce	133000	81000	214000	" "
Fir (Amabalis)..	23000	42000	65000	" "
Hemlock	3000	10000	13000	" "
Cedar Bolts.....	500	580	1080	cords
Cedar Poles	5000	10000	15000	linear feet.

"VALUE.—(a) Land. On the same basis that we use in appraisals in this vicinity the land would be worth in the vicinity of $400.00. However, this is largely theoretical value, as, situated where it is, the land alone means very little and has whatever value is attached to it because of the timber. The land is of fairly good quality and as such has some value, but in the case of timber lands, it is generally the timber that is sold and the prices are based on the timber with the land thrown in. Where the land is of good quality it would increase the value of the tract. The land in this case, being as inaccessible as it is, would still have some value but it would be largely a paper value and a very poor sale value."

"(b) Timber. The timber on this tract would be worth about $3900.00, making the entire tract worth some $4300.00. [36]

The timber has an actual sale value and is both salable and marketable even though it is removed from any present scenes of logging or milling,

Timber being removed from present markets and railroads lowers the price of it but it still has ready sales and in the case of a tract such as this the timber really carries whatever value may be attached to the land."

"Regardless of whether the values placed on the land and timber on this tract are either somewhat high or low there is no question but that the value of the timber is greatly in excess of the value of the land either for agricultural or grazing purposes. The estimates shown above would indicate that the land value is approximately 10% that of the timber value and if anything it's a question of whether this additional 10% should not be credited to the timber as it is really the timber that makes this value possible."

"In this connection it can also be said that there are but a very few allotments (already made) on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value."

After the admission in evidence of the above letter, counsel for plaintiff expressed a desire to cross-examine Mr. Hill in reference to the report, in regard to the accessibility of the land, the character of the timber on it and the value of the timber claims in that locality and of the timber upon that land, but the Court admitted the same as a Government record, stating counsel for plain-

tiff could subpoena Mr. Hill as a witness to cross-examine him if he desired to do so.

At this point the following took place:

Mr. MOUNT.—I would be willing to stipulate, if counsel is willing to concede it, that there has not been any allotment made under the terms of the treaty with the Quileute and Quinaielt Indians, made July 1st, 1885, and no allotment made on the reservation until long after the passage of the Act of February 8th, 1887. Other than that I cannot see [37] that any additional witnesses would be of advantage, because we have in evidence practically everything that our witnesses would testify to, with this record, and statement that there were no allotments made under the treaty, and that allotments were not made until after the Act of Congress of 1887. That is substantially what we would prove were our witnesses present.

Mr. GRIFFIN.—I think that is very largely a question of law. The treaty gave these Indians certain rights and the allotment Act provides that where allotments are provided in the treaty and the amount provided for in the treaty, it gives the Indians a right to a greater amount than eighty acres, the treaty shall govern. However, this plaintiff is only, in this suit, demanding that he be allotted the eighty acres selected by him. The Government has taken the position for a long time that they would not allot to the Indians in excess of eighty acres in all the treaties where the provisions are substantially the same as they are here. Under the statute he is clearly entitled to eighty

acres and he is also entitled to eighty acres under the treaty, if no more.

The COURT.—And he has not got any?

Mr. GRIFFIN.—He has not got any.

The COURT.—And this, which Mr. Mount is asking you to concede, does not conflict with that.

Mr. GRIFFIN.—I am willing to concede that allotments were not made until after '87.

The COURT.—Whether it was made under the Treaty or under the Act, you claim that it is a proposition of law, and you are not conceding it, as a matter of fact?

Mr. GRIFFIN.—No. * * *'' [38]

ARTHUR E. GRIFFIN, offered himself as a witness in reference to the amount of timber upon fair, good and extra good timber claims. Before allowing him to be sworn in, the Court questioned Mr. Griffin as follows:

The COURT.—Then you are conceding what he (Mr. Mount) asks except you are not conceding that the allotments that were made were made pursuant to the act of '87 to the exclusion of the treaty?

Mr. GRIFFIN.—Yes.

The COURT.—You are leaving that open as a question of law?

Mr. GRIFFIN.—Yes.

Testimony of Mr. Griffin, for Plaintiff.

Being duly sworn Mr. GRIFFIN testified that he had lived in the State and territory of Washington since the 15th of April, 1884; that during that time he had assisted in surveying a number

(Testimony of Mr. Griffin.)

of timber claims and assisted in cruising a number of timber claims; had been familiar with the amount of timber upon the timber claim by representing clients that have been buying, and had examined the abstracts of many claims which had been bought by his clients. That he had also been along the Pacific Coast south of the Makan reservation at Cape Flattery, and further on down to the Suez river and owned one timber claim near the Suez river. That he had also been down to the Quileute reservation and examined timber claims to some extent. That he had made many inquiries among timber men as to the amount of timber upon claims which were considered fair and good timber claims and exceptionally good timber claims.

Witness testified that in his judgment a timber claim of 160 acres which has less than four million feet, would be classed as a poor timber claim. A claim of five million feet to seven and a half million feet, would be considered a good timber claim, [39] referring to a 160-acre claim. Claims from seven and a half to fifteen million feet and above that are considered exceedingly good timber claims.

In regard to the amount of timber on this tract of land, the amount of timber is given in board feet and in cords for bolts. That on an average they consider a cord of bolts about equals a thousand feet board measure in lumber, which is the amount applied to the two claims, which would

(Testimony of Mr. Griffin.)

make this about a two million foot claim, for 160 acres. This Indian claims the right to that land because of the fact that he is an Indian and because the treaty gives him the right to it, and because the statute gives him the right to it. This eighty would be half of a claim as is generally considered by timber men in buying claims, 160 acres.

Witness also testified that land upon which cedar and spruce grow in the State of Washington is usually good agricultural land after the timber is removed.

Upon cross-examination the witness testified that if there was only one million feet of timber on the eighty in question he would classify it as agricultural land rather than a timber claim, and that it would be agricultural land regardless of whether the timber was on it or not.

In regard to his experience in cruising timber, the witness testified that in the early days he had been located at Enumclaw and assisted in surveying and subdividing several sections of land up there which Robert Wingate had purchased from the Northern Pacific; that at that time there was a big tract of country extending up the White River for miles and settlers were coming in at that time taking up claims from eighty acres on; that witness was interested in developing that country and on behalf of Mr. Cooper, agent of the Northern Pacific Railway Company, [40] assisted a num-

(Testimony of Mr. Griffin.)

ber of people to settle in there, went with them and found the corners of their ground where it was possible to find them and assisted them in locating their claims, also further north and east up the White River and Natches Pass. He never following timber cruising as a profession or as a business. That he assisted the Northern Pacific Engineers in locating the main line of the Northern Pacific Railway Company from about Coal Creek, which is a little east of Enumclaw, over the summit of the Cascade Mountains, and assisted in surveying the old switchback over the top of the mountains in 1885, which was location work.

Respectfully submitted,
ARTHUR E. GRIFFIN,
Attorney for Respondent. [41]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Approving Statement of Evidence.

I, Edward E. Cushman, Judge of the above-entitled Court, and the Judge before whom the

above case was tried, upon stipulation of plaintiff's counsel hereto attached, do hereby certify, the plaintiff and the defendant having been represented by their respective counsel in open Court, that the foregoing is a true and complete statement of all the evidence essential to the decision of the questions presented by the appeal of the defendant from the judgment entered herein against the defendant and in favor of the plaintiff; and I do hereby approve the same as the statement of the evidence in said matter for the purpose of said appeal, and do hereby order that the same become a part of the record for the purpose of said appeal, and order further that all the original exhibits be transmitted to the Appellate Court.

Done in Court this 15th day of July, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 15, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [42]

The evidence submitted on behalf of the Government is contained in a letter addressed to the Commissioner of Indian Affairs and signed by Superintendent Eugene W. Hill of Taholah, Washington, and marked as Government's Exhibit "A". The letter is as follows:

Government's Exhibit "A".

"LOCATION.—This tract of land lies on Raft River and about two or two and one-half miles from

the mouth of the River. A poor and very slightly used foot trail goes through the tract and is the only means of getting to this or any of the adjacent land. The nearest habitation of any sort is up on the Queets River, about 8 miles distant from the tract and is reached by going along the beach. There is no road of any sort between Raft River and the Queets. Raft River is about 11 miles from Taholah and is reached by going up the beach at low tides and crossing the bluffs on very poor trails which are almost impassable more than half of the year. Very small gas boats (30 feet or so in length) can enter Raft River at high tide and with a quiet sea but the river is too small and shallow to permit of large boats entering or of small boats entering at any but full tides.

"LAND.—About 30 acres of the land consists of level and fairly rich bottom which would, if cleared, make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would, if cleared, make grazing and possibly farm land. The land is all heavily timbered, however, and clearing such land would cost from $150 to $250 per acre, and situated as it is the land when cleared could probably scarce pay for the taxes.

"TIMBER.—The timber on the area consists of a mixed stand as shown by the cruise below, the cedar predominating. As is the case of timber near the salt water it is not of the best quality, but it is all sound, of good quality (not best) and is not at present deteriorating.

	NW¼ NW¼	SW¼ NW¼.	Totals	
Cedar	474000	272000	746000	board feet
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"VALUE.—(a) Land. On the same basis that we use in appraisals in this vicinity the land would be worth in the vicinity of $400.00. However this is largely a theoretical value as, situated where it is, the land alone means very little and has whatever value is attached to it because of the timber. The land is of fairly good quality and as such has some value, but in the case of timber lands, it is generally the timber that is sold and the prices are based on the [43] timber with the land thrown in. Where the land is of good quality it would increase the value of the tract. The land in this case, being as inaccessible as it is, would still have some value but it would be largely a paper value and a very poor sale value.

"(b) Timber. The timber on this tract would be worth about $3900.00, making the entire tract worth some $4300. The timber has an actual sale value and is both salable and marketable even though it is removed from any present scenes of logging or milling. Timber being removed from present markets and railroads lowers the price of it but it still has ready sales and in the case of a tract such as this the timber really carries whatever value may be attached to the land.

"Regardless of whether the values placed on the land and timber on this tract are either somewhat high or low there is no question but that the value of the timber is greatly in excess of the value of the land either for agricultural or grazing purposes. The estimates shown above would indicate that the land value is approximately 10% that of the timber value and if anything it's a question whether this additional 10% should not be credited to the timber as it is really the timber that makes this value possible.

"In this connection it can also be said that there are but a very few allotments (already made) on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land, and generally in these few cases the factors that made for a low timber value would also serve to make the land of but very little value." [44]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending February Term.

This matter coming on regularly for hearing this first day of July, 1922, upon the motion of W. W.

Mount, attorney for the above-named defendant, and the Court being fully advised,

IT IS HEREBY ORDERED that the February Term, 1922, of the above-entitled Court be held open and continued as to the above-entitled case for a period of thirty days from this date.

Done in open Court this first day of July 1922.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [45]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Praecipe for Transcript of Record.

To the Clerk of the above Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, to wit:

1. Bill of complaint.
2. Answer.
3. Demurrer to answer.
4. Memorandum decision on Demurrer.
5. Memorandum decision on the Merits.
6. Decree.
7. Findings of fact and conclusions of Law.
8. Defendant's Exceptions.
9. Petition for appeal.
10. Assignment of errors.
11. Order allowing appeal.
12. Order extending time to March 20, 1922, to file bill of exceptions. [46]
13. Order extending time to May 19th, 1922, to file bill of exceptions.
14. Plaintiff's proposed statement of evidence.
15. Order approving statement of evidence.
16. Defendant's Exhibit "A".
17. Citation.
18. Praecipe of defendant for record on appeal.
19. Order extending February Term.
20. Order extending time for filing record in Circuit Court of Appeals.

Dated at Tacoma, Washington, June 10 1922.

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Defendant.

Service in the foregoing praecipe is hereby admitted this 13th day of July, 1922.

GRIFFIN & GRIFFIN,
Attorneys for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 1, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy Clerk. [47]

United States of America,
Western District of Washington,—ss.

Certificate of Clerk U. S. District Court, to Transcript of Record.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing pages numbered from one to fifty inclusive, contain a true and correct transcript of the record on appeal in the case of Tommy Payne, Plaintiff, versus The United States of America, Defendant, No. 111–E, in said District Court, as required by praecipe of Thos P. Revelle, United States District Attorney and W. W. Mount, Assistant United States District Attorney, attorneys for the United States, appellant herein, filed and shown herein as the originals appear and are of record in my office in said district at Tacoma.

I further certify and return that I hereto attach and transmit the original citation, the original order extending time in which to file the record of appeal herein with the Circuit Court of Appeals, and that I am also transmitting herewith, the original Exhibits filed in said cause, said exhibits being as follows:

Defendant's Exhibit "A."

Attest my hand and the seal of said District Court at Tacoma, in said District, this 21st day of June, A. D. 1922.

[Seal] F. M. HARSHBERGER,
Clerk.
By Alice Huggins,
Deputy Clerk. [48]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Citation on Appeal.

United States of America, to Tommy Payne and Griffin & Griffin, His Attorneys, GREETINGS:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, California, thirty days from and after the days this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States District Court for the Western District of Washington, Southern Division, wherein the United States of America is the appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as

in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court of the Western District of Washington, Southern Division, this 16th day of May, A. D. 1922.

EDWARD E. CUSHMAN,
United States District Judge. [49]

United States District Court, Western District of Washington, Southern Division.

No. 111–E.

TOMMY PAYNE,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

Order Extending Time to and Including August 1, 1922, to File Record and Docket Cause.

BE IT REMEMBERED that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended;

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the date and time for filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit, at San

Francisco, California, be, and the same is hereby extended to and including the 1st day of August, 1922.

Done in open court this 20th day of July, 1922.

EDWARD E. CUSHMAN,
Judge U. S. District Court.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Southern Division. Jul. 20, 1922. F. M. Harshberger, Clerk. By Ed M. Lakin, Deputy. [50]

[Endorsed]: No. 3897. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Appellant, vs. Tommy Payne, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed July 24, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 3897

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TOMMY PAYNE,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDW. E. CUSHMAN, *Judge*

BRIEF FOR THE APPELLANT.

THOS. P. REVELLE,
United States Attorney,

W. W. MOUNT,
Assistant United States Attorney,

Attorneys for Appellant.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

No. 3897

In the United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TOMMY PAYNE,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HON. EDW. E. CUSHMAN, *Judge*

BRIEF FOR THE APPELLANT.

STATEMENT.

This action was brought by Tommy Payne, a full blooded Indian of the Quileute tribe, to compel the Secretary of the Interior to allot to him a certain described tract of land within the Quinaielt Indian Reservation in the State of Washington. The eligibility of the plaintiff to receive an allotment on this particular reservation is conceded

and not contested by the Government. The only question involved in this case in whether or not the particular tract, as selected by the plaintiff, is available for allotment purposes under the existing laws.

In answer to the plaintiff's Petition the Government alleged that the land selected by the plaintiff and described in said Petition, is not such land as is or would be available for agricultural or grazing purposes, but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes. To this answer a demurrer was interposed by the plaintiff. Upon the hearing the trial court sustained the plaintiff's demurrer to this portion of the Government's defense but, on account of the broad denials contained in the answer, the demurrer as a whole was overruled. However, upon the trial of the case, evidence pertaining to this particular defense was admitted by the court for the purpose of the record.

The trial court in its decision, allowed the plaintiff the relief as he prayed for in his petition. From this decision the Government prosecutes this appeal.

SPECIFICATION OF ERRORS.

First. That the District Court erred in sustaining the plaintiff's demurrer to that portion of the defendant's answer alleging that the land mentioned and described in the plaintiff's petition was not such land as is or would be available for agricultural or grazing purposes but on the contrary is heavily timbered and timbered to such an extent that the timber value thereof greatly exceeds the value of said land for agricultural or grazing purposes.

Second. That the District Court erred in finding that the land selected for allotment by the plaintiff, Tommy Payne, was subject to selection and allotment under the laws of the United States and that the plaintiff is lawfully entitled to have such land allotted to him.

Third. That the District Court erred in finding that the officers and agents of the United States of America have wrongfully failed, neglected and refused to allot the said land to the plaintiff or to issue to the plaintiff any trust or fee patent therefor.

Fourth. That the District Court erred in adjudging that the plaintiff was entitled to a decree

adjudging and decreeing that the said plaintiff, Tommy Payne, is entitled to the land selected for his allotment and that the plaintiff is entitled to have said land allotted to him by the defendant, its officers and agents.

Fifth. That the District Court erred in concluding that the plaintiff is entitled to the immediate possession of said lands and is entitled to go upon the same with himself and his family, and to build, clear, and improve said lands, and to use the same and all parts thereof for his home for himself and said family, and is entitled to all the rights guaranteed to said plaintiff and the Indians of his said Tribe by the Treaty made and entered into by the United States and said Quileute Tribe and Band of Indians.

Sixth. That the District Court erred in concluding that the plaintiff is entitled to a decree estopping the defendant, its officers and agents from hereafter interfering with the plaintiff in his right to the possession of said lands and his right to improve the same, and estopping the defendant from hereafter claiming or asserting that said plaintiff is not entitled to go upon, clear, improve and build upon said land.

ARGUMENT.

While the foregoing errors have been separately enumerated, the only question involved in this appeal is whether the particular tract selected by the plaintiff for allotment is actually available under existing laws, for this purpose. In view of this situation, the errors will be discussed as a whole rather than individually in this argument.

Under the Act of Congress of February 8th, 1887, (24 Stat. L. 388), as amended, the President of the United States is authorized to allot Indian Reservation lands:

"* * * whenever in his opinion such reservation, or any part thereof, may be advantageously utilized for agricultural or grazing purposes by such Indians * * *"

It is the contention of the defendant that, under the Act of Congress, cited above, that the law did not contemplate the allotting of heavily timbered tracts of land such as the selection at issue in this case.

The land selected by the plaintiff is heavily timbered as shown by the report introduced in evidence and marked as "Defendant's Exhibition 'A' "

in this case. The report further shows that this particular tract has very little value except for the value of the timber. The timber is estimated as being worth $3900.00. Section 4230 U. S. Comp. Stat. provides that timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior and the proceeds from such sales to be used for the benefit of the Indians of the reservation. There is no law permitting the allotment of the land and reserving these timber benefits to the Indians of the reservation. Consequently, if the Indians of the Quinaielt reservation are to be benefitted by the timber on the unallotted lands of the reservation, the timber will have to be removed and sold prior to allotment. It is the defendant's contention that the land will have to be cleared of this timber before such land is subject to allotment since its present value is only a timber value and as such the land cannot be classified as agricultural or grazing in character.

It has been held that land which is valuable for minerals contained therein is not subject to allotment. This situation arose in the case of *Collins v. Bubb*, cited in 73 Fed. 735. This was an action against the agent in charge of the Col-

ville Reservation in Washington to enjoin him from expelling the plaintiff from the limits of the Reservation and thus preventing the plaintiff from carrying on his mining operations. The plaintiff contended that that part of said Reservation which embraced his mining claim had been restored to the public domain under the Act of Congress of July 1st, 1892 (27 Stat. L. 62). This Act permitted allotments to Indians as provided in the Act of Congress of February 8th, 1887. In construing these acts Judge Hanford said:

"The law, by mandatory words in the present tense, annuls the executive order creating the Reservation as to said tract and restores the same to the public domain subject only to the rights of the Indians to make selections of lands to be allotted to them in severalty. *The lands valuable for the minerals contained therein are not subject to be selected for allotment to the Indians. It is the intention of the law, in providing for allotments of land in severalty, to award to each Indian agricultural land to be his home.*"

If this Act is inconsistent with the treaty of July 1st, 1855 (12 Stat. L. 971) it, to that extent, supersedes the treaty, yet the defendant is in accord with the principle that it is the duty of the court to give full effect to both "where it can reasonably be done." The Department of Interior

is, and always has been willing to give full credit to every right conferred upon the Indians by any treaty or statute keeping in mind, however, that the affairs must be administered for the benefit of the tribe as a whole.

According to the evidence in the case, there was not a single allotment made on the Quinaielt Reservation until long after the Act of February 8th, 1887, *supra*. The provisions of the statute differ from the provisions of the treaty in such manner as to make the former preferable from the view point of both the Indians and the Government. While the two may not be positively incompatible *it is altogether impracticable to give full effect to both.*

In view of the impracticability of observing both the treaty and the statute and in consideration of the greater adaptability of the provisions of the statute over those of the treaty, the Act of February 8th, 1887, *supra*, as amended, was long ago held by the Department of Interior to be the law governing the allotting of lands on that reservation and it is absolutely right and greatly to the benefit of the tribe that it should be so.

The treaty provides for allotting lands to only

those Indians who *are willing to locate on the same as a permanent home.* The provisions of the subsequent statute do not even require the allottee to reside on the allotment. This marked advantage of the statute over the treaty is of special significance when applied to the peculiar conditions obtaining on the Quinaielt Reservation and may be briefly summarized as follows:

1. These Indians are fishermen by trade and have of necessity collected in villages at those points on the streams where fishing can be carried on most successfully.

2. The lands on the reservation, except small areas along the streams, are so poorly adapted to any domestic industry, and are so devoid of the surroundings conducive to a home and so inaccessible that it would be practically impossible for the allottees to establish a permanent home on their allotments except in comparatively few instances.

These conditions explain why not a single allotment was made on this reservation under the provisions of the treaty, although a period of more than thirty years elapsed between the date of the treaty, July 1st, 1855 and the passage of the Act of February 8th, 1887, *supra.*

The subsequent statute, under which the allotments on this reservation were finally made, provides for allotments to individuals in all cases —not by families where the children are minors —as provided in the treaty. Had the Department of Interior attempted to assign allotments under both the treaty and the statute or should it now attempt to do so, the task of adjusting the rights of allottees by families (under the treaty), as compared with their rights as individuals (under the statute), would result in endless confusion and would carry no advantages for either the Indians or the Government. Consequently the subsequent statute has been held and regarded by the Department as the governing law.

While this construction by the Department is in no wise binding upon the Court, yet, nevertheless it has been repeatedly held by the Supreme Court of the United States and various circuit and district courts, that where the meaning of a statute is doubtful, great weight is given to the construction placed upon it by the Department charged with its execution.

Swigart v. Baker, 229 U. S. 187; 33 Sup. Ct. 645; 57 L. Ed. 1143.

Jacobs v. Pritchard, 223 U. S. 290; 32 Sup. Ct. 289; 56 L. Ed. 405.

United States v. Hermanos, 209 U. S. 337; 28 Sup. Ct. 532; 52 L. Ed. 821.

Blanset v. Cardin, et al., 261 Fed. 309;

Bethlehem Shipbuilding Corp. v. West and Dodge Co., 269 Fed. 100 and cases cited.

Another angle to the instant case pertains to the discretionary power vested in the President to determine the character of Indian reservation lands to be allotted. The particular language in question is quoted as follows:

"* * * the President shall be authorized to cause the same (reservation), or any part thereof, to be surveyed or resurveyed whenever in his opinion such reservation, or any part thereof, may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest * * *"

The defendant contends that this provision of the law vests in the President the power to determine whether an allotment selection is of such character as to be utilized for agriculture or grazing, and also the power to reject any such selection that he may decide does not meet the requirements of the law. If this be not so then the questions arise as to (1) whether the President must use his discretionary power by refusing to have reser-

vation lands surveyed if he does not deem them suitable for agriculture or grazing, or (2) whether he may have the whole or a part of the reservation surveyed at any opportune time, and then use his discretion as to approving only such allotment selections as are suitable for agriculture or grazing.

The latter plan is not only more feasible but appears to be more in accord with the intention of Congress in enacting the law. Surveying the lands is merely incidental to the allotting of the lands that are suitable.

Unless the lands are surveyed it is difficult to see how the President can intelligently formulate an opinion as to whether or not the land "may be advantageously utilized for agricultural or grazing purposes." If, after survey, the lands appear to come within the classification that they "may be advantageously utilized for agricultural or grazing purposes" in the opinion of the President, he then is vested with the discretionary power of authorizing or "causing the allotment to each Indian located thereon to be made in *such areas* as in his opinion may be for their best interest." Congress never intended to limit the discretionary power of the President after having the lands surveyed. The language of the statute is plain in this re-

spect. It reads: The President shall be authorized (not only to cause the survey to be made, but also) to cause allotment to each Indian located thereon to be made *in such areas as in his opinion may be for their best interest.*"

Consequently, if the President determined that it would be to the best interest of the tribe to cause the timber to be removed from certain areas before, in his opinion, such areas should be subject to allotment, then according to the terms of the statute, he could refuse to cause such timbered areas to be subject to allotment.

In other words, the statute, in addition to giving the President the discretionary power of causing the lands to be surveyed, also confers upon him the power to cause such allotments to be made in accordance with the best interests of the Indians themselves. If, in the opinion of the President, the lands possessed some special valuation and he considered that it would be to the best interests of the tribe not to allot such areas, that, under the statute would be his discretionary power.

Hence, in the case at bar the defendant claims that the property selected by the plaintiff possesses a value for its timber which is ten times the value

of the land and under the terms of the statute is not subject to allotment.

In the absence of an affirmative showing (1) that this particular tract, here in issue, has been surveyed in accordance with the terms of the statute and (2) for the further reason that no showing was made or proof introduced by qualified witnesses that the lands embraced within the reservation could be advantageously utilized in the opinion of the President for agricultural or grazing purposes, or (3) that such allotment if made would in the opinion of the President be for the best interests for the Indians located on said reservation, the defense is of the opinion that this cause of action should be dismissed.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
W. W. MOUNT,
Assistant United States Attorney,
Attorneys for Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit

THE UNITED STATES OF AMERICA,
Appellant,

vs.

TOMMY PAYNE,
Appellee.

No. 3897

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

Brief of Appellee

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METROPOLITAN PRESS—SEATTLE

In the United States Circuit Court of Appeals for the Ninth Circuit

THE UNITED STATES OF AMERICA,
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vs.

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Appellee.

No. 3897

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HON. EDWARD E. CUSHMAN, *Judge*

Brief of Appellee

STATEMENT

This suit was brought by Appellee, a full blood Quileute Indian, who resides with his family in the Indian village situate on the small reservation at the mouth of the Quileute River in Clallam County, Washington.

About ten years ago the President had caused the Quinaielt Reservation to be surveyed and opened for allotment to the Quinaielt and Quileute Indians for whom this reservation had been set apart and selected by the United States under the provisions of the treaty made with Governor Isaac I. Stevens, July 1, 1855, and January 25, 1856. (12 Stats. 971), and directed by special statute of March 4, 1911, 36 Stat. 1345.

The petition was filed and decree rendered and properly certified as provided by Act of March 3, 1887, 24 Stats. 505, as amended by Act of February 6, 1901, 31 Stats. 760.

The treaty made with these Indians provides:

> "There shall, however, be reserved for the USE and OCCUPATION of the tribes and bands aforesaid, a TRACT or TRACTS of land sufficient for their wants * * * to be selected by the President of the United States and hereafter surveyed or located and set apart for THEIR EXCLUSIVE USE."

It is admitted in the answer filed that for about nine years after Appellee had made his selection of the land from the lawfully appointed and acting agent, he had been excluded from and prevented from going upon and occupying it as a home for himself and family by Appellee.

The only excuse for withholding this land from Appellee is the claim that it is more valuable for timber than for agricultural or grazing purposes.

The Court sustained a demurrer to the affirmative defense. At the trial the Court permitted a letter of a government employee, to the effect that the land was more valuable for timber than for agriculture or grazing purposes, to be introduced in evidence. This evidence was admitted to permit Appellant to make a record.

In this letter it was further stated:

> "In this connection it can also be said that there are but very few allotments already made on this reservation on which the timber value is not greatly in excess of any value that can be credited to the land."

It should be kept in mind that this reservation, which was to be for the SOLE USE and OCCUPATION of these Indians was not defined in the treaty, but later selected by the President, and probably without suggestions from them.

ARGUMENT

Common justice would suggest that a guardian (the United States), having selected these lands for its wards (these Indians) is estopped from asserting that the very lands which it has selected for

their sole use and occupation is not suitable for their use and occupation.

Thus at the threshhold of its appeal the Government is met with a universally recognized and adhered to rule of law based upon common sense and justice, that a guardian, at least in dealing with a ward, is bound by its act and deed, and will not be heard in a court of equity to repudiate its deliberate acts.

If it was contended that some great wrong would or might come to the ward by a wrongful or improvident selection hastily or inadvertently made, some possible excuse might be offered, but in this case the ward is denied the right to land for a home for sixty-six years after the treaty, nine years after the allotment is selected, forsooth, because after these long years the timber upon it has become more valuable than the land would be with such timber removed.

Appellant has cited no authority to justify denying this Indian the rights to the land.

It is the undisputed evidence that thirty acres of the land is not timbered, but rich bottom land covered only with brush, and that it will all be good agricultural land after the timber is removed.

The great majority of the farms in Western Washington have been carved out of heavily timbered lands. Very few of them had as large proportion as this tract of brush land, comparatively easily cleared.

It is not desired, however, that the decree in this case be affirmed upon the sole ground that this tract is nearly half open land, but because Appellee is entitled to the land with rights dating from the time it was selected by him.

Appellee is clearly entitled to the allotment selected, both under the treaty (which was signed by his father, Tah-ah-he-whitl); under the general Act, February 8, 1887, 24 Stats. 388, amended February 28, 1891, and June 25, 1910, 36 Stats. 859, and special Act March 4, 1911, 36 Stats. 1345.

The alloting act provides that allotments shall be selected by the Indians. Appellee made his selection of this land. It further provides:

> "The allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in

> charge of such reservation under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special alloting agents, superintendents or agents to the Commissioner of Indian Affairs in duplicate, one copy to be retained in the Indian Office, and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office."

The special Act of March 4, 1911, 36 Stat. 1345, provides:

> "That the Secretary of the Interior be and he is hereby authorized and DIRECTED to make allotments on the Quinaielt Reservation, Washington, under the provision of the allotment laws of the United States to all members of the Hoh, QUILEUTE, Ozette, or other tribes of Indians in Western Washington who are affiliated with the Quinaielt and Quileute tribes in the treaty of July 1, 1855, and January 23, 1856, and who may elect to take allotments on the Quinaielt reservation rather than on the reservation set aside for these tribes; Provided, that the allotments authorized herein shall be made from the surplus lands on the Quinaielt Reservation after the allotments to the Indians thereon have been completed."

The evidence is conclusive and uncontradicted that the President exercised his discretion to have the lands surveyed and allotted in severalty; that Frank Archer was appointed special allotting agent to make the allotments upon this reservation; that

Appellee made his selection of the lands in question by applying to Mr. Archer, and it was marked on the alloting lists and set apart to him; that all, or practically all, of the Quinaielt Indians have received their allotments, but that Appellee and the Quileute Indians who have as much right to allotments as the Quinaielt Indians have been excluded and denied the right to occupy the lands selected by them, the only excuse for excluding him and other Quileutes being that the land is now more valuable for timber than for agriculture and grazing.

The land is clearly within the statute which permits agricultural and grazing lands to be allotted. There are no qualifications or restrictions upon the character of land to be allotted under the treaty, or under the special Act of March 4, 1911 directing that these allotments be made.

It is no reason for excluding Appellee that the lands which are valuable for agriculture and grazing are also valuable or more valuable for timber than for agriculture.

The policy of the Government should be to encourage the Indians to obtain homes upon the reservation and to use and cultivate the ground.

The statute under which the suit is brought is

very broad, 31 Stat. 760. It provides:

> "That all persons who are in whole or in part of Indian blood or descent who are ENTITLED to an allotment of land under any law of Congress or who *claim to be so entitled* to land under any allotment act or under any grant made by Congress, or who claim *to have been unlawfully denied* or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress may commence and prosecute or defend any action, suit or proceeding in relation to their right thereto in the proper circuit court of the United States, and said courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person in whole or in part of Indian blood or descent to any allotment of land under any law or *treaty* * * * , and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect when properly certified to the Secretary of the Interior AS IF SUCH ALLOTMENT HAD BEEN ALLOWED and approved by him."

By this statute it is made the duty of the courts to hear and determine all claims of Indians who claim the right to an allotment under any law or treaty or who claim to have been wrongfully excluded from having an allotment.

Appellee, as stated, did all he could do and all he was required to do to obtain this allotment and for approximately nine years he has been excluded,

not because he was not entitled to it by right; not because the President had not exercised his discretion to act; not because the land was not available and suitable for agriculture as soon as the brush was removed from thirty acres and the timber from the remainder, but solely upon the excuse that the timber upon this land is now of more value than the value of the land for agricultural purposes.

No cases are cited which hold an Indian can be denied lawful rights because those rights are valuable and entitle him to valuable property, and why should this guardian seek to deprive his ward of valuable property? Appellant's brief suggests no answer to this pertinent question.

The late General Hazard Stevens, in his History of the life of his father, and who was present when most of the Washington and Oregon treaties were made, writes of the promises made by his father to induce the Indians to sign.

At page 463 of the History he quotes his father as having told the Indians: "We want to place you in homes where you can cultivate the soil, raising potatoes and other articles of food, and where you may be able to pass in canoes over the waters of the Sound * * *. The Great Father desires this,

and this is why I am able to say this, the Great Father thinks you ought to have homes and he wants you to have a school. Those white children have always told you you would be paid for your lands, and we are here now to buy them."

At the Point No Point treaty he told them, Vol. 1, page 469: "The Great Father wants you and the Whites to be friends; he wants you to have a house of your own, to have a school where your children can learn. He wants you to learn to farm, to learn to use tools * * * This you will have all the time and when the PAPER COMES FROM THE GREAT FATHER, THEN YOU WILL HAVE YOUR OWN houses and homes and schools."

At page 472: "The Governor addressed them, pointing out THAT THE TREATY GAVE THEM ALL THOSE THINGS that a father would give his children, as homes, schools, medicines and a doctor."

At the Medicine Creek Treaty, (page 458), Governor Stevens told them: "You will have certain lands set apart for your homes."

It is reasonable to suppose the same or similar promises were made to the Quileutes at the time their treaty was negotiated.

The treaty was interpreted to these Indians in Chinook jargon (a very imperfect means of communicating any but the most simple transactions and thoughts). It provides, (12 Stat. 971), Art. 6:

> "The President may further at his descretion cause the whole or any portion of the lands to be reserved, or of such other land as may be selected in lieu thereof to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege and will locate on the same as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas, so far as the same may be applicable."

The sixth paragraph of the Omaha treaty provides for an allotment of eighty acres to an individual and more to families according to the number of family members, and for issuing patents to the allottees. (10 Stat. 1043.)

In the case of *Seufert Bros. Co. vs. U. S.,* 249 U. S. 194, 63 L. Ed. 555, the Supreme Court quoted with approval from *United States vs. Winans,* 198 U. S. 371, 49 L. Ed. 1089, as follows:

> "We will construe a treaty with the Indians as 'that unlettered people' understood it, and as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection, 'and coun-

> terpoise the inequality' by the superior justice which look only to substance of the right without regard to technical rules. *Choctaw Nation vs. U. S.* 119 U. S. 1, 30 L. Ed. 306; *Jones vs. Meehan,* 175 U. S. 1, 44 L. Ed. 49."

Referring to the *Kansas Indians,* 72 U. S. 737, 18 L. Ed. 667, the Supreme Court said:

> "If they have outlived many things they have not outlived the protection afforded by the Constitution, treaties and laws of Congress."

Viewing the sixth article of the treaty with this light of this reliable history there can be no doubt that the Indians understood the word "may" as "will", in the sixth article, and that it was a positive promise that lands *would* be assigned them sufficient for their homes and needs.

There is no merit in Appellant's contention that the lands are not adapted to agriculture and grazing, because they are in part covered with timber. This contention is disproved by thousands of Western Washington and Oregon farms that were once heavily timbered. This is true more or less through the Eastern and Southern states. Lands once timbered are now producing farms.

It is pertinent to ask why was any provision made in the treaty or statute for allotments at all,

if the reservation selected was all timbered and timber land was not to be allotted.

It is argued in Appellant's brief there is no affirmative showing that the President has decided that this "particular tract" herein in issue, has been surveyed in accordance with the terms of the statute, or "that lands embraced within the reservation could be advantageously used for agriculture or grazing purposes."

Appellee testified, (R. 34):

> "The Quinaielt Reservation was surveyed about twelve years ago, after which he selected his allotment. * * * Mr. Archer at that time was the allotting agent. Mr. Archer instructed his assistant to go and see the plaintiff together with the rest of the people that were entitled to an allotment, and they (he) showed plaintiff MAPS and LOCATIONS of WHERE THERE WAS GOOD LANDS FOR AGRICULTURAL PURPOSES. That is how he (plaintiff) got it."

This evidence is uncontradicted and covers every point suggested in Appellant's brief: that the President had theretofore had the lands surveyed, had opened it for allotments, had appointed a special allotting agent, had selected portions of the reservation that was suitable for agriculture, and that the representative of the President, appointed for the purpose, assisted Appellee in selecting his allotment.

It would seem this is a proper case to apply the rule announced in *Choctaw Nation vs. U. S., supra,* and to "counterpoise the inequality by the superior justice which looks only to substance and the right, without regard to technical rules."

The claim that the land is not suitable for agriculture is contrary to the evidence. The evidence introduced by Appellant, (R. 49), is as follows:

> "About 30 acres of the land consists of level and fairly rich bottom which would if cleared make good farm land. The balance (50 acres) consists of rolly bench and side hill slope to the higher land back from the river, and would if cleared make grazing and possibly farm land."

Appellee testified, (R. 36):

> "Plaintiff feels sure he can support his family if given the right to that land; that both white people and Indians along the Queets River are making a good living today out of their farms, * * * about six miles from the land plaintiff selected."

Jack Ward, Appellee's witness, testified (R. 38):

> "The land (selected) is the same as around the Queets country where the farmers live; that he would say pretty near one-half of that selection was good for agricultural land, and the other half toward the hill is timber, and if the timber were removed would be about the right kind of land for agriculture and grazing. * * The Indians (in the Queets country, six miles away) have cleared their land and live on it and make a living there. * * * There are

> about eight Indian families and right across the river there are over twenty white families. One farmer (white) has about 40 head of cattle and has cleared about sixty acres of his ranch. * * * Most of those lands in that valley were just like the one Mr. Payne selected and now they have big farms out of it."

The decision of the Circuit Court of Appeals in *Leecy vs. U. S.,* 190 Fed. 289, is on all fours with this case. The appeal of that case was dismissed upon motion of the Attorney General in the Supreme Court, 232 U. S. 732, 58 L. Ed. 818. In that case a section of land, part of the Mille Lac Indian reservation, was withdrawn by order of the Secretary of the Interior from allotment in order that the timber upon it could be cut, the lumber to be used to build houses for the Indians. Thereafter Mrs. Leecy selected a part of the land so withdrawn for an additional allotment. The Circuit Court decided the Secretary's action in withdrawing the land until the timber could be removed was without authority of law and invalid. At page 292, the Court says:

> "Congress authorized the allotment of these lands, and if the Secretary of the Interior could under his authority withdraw a portion of them from allotment, he could withdraw substantially all of them if that seemed in his judgment best, and under the contention of the Government he would be executing an allotment law under

rules and regulations prescribed, when in fact he nullified the law by withdrawing the very lands from allotment which Congress had authorized to be so distributed. The law was to be executed under, not nullified by, rules and regulations. The power to withdraw the land in question cannot be found in the provision that allotments should be certified by the Secretary of the Interior for his action in the one providing for his approval of allotments before patent."

Referring to the Act under which that and this suit are brought, the court says, (p. 293):

"It is manifest that no Indian would have occasion to seek relief under this statute until his right had been denied by the Interior Department. It is certain that the purpose of this statute was to confer substantial rights upon Indian claimants, and yet it is insisted that as allotments must be reported to the Secretary of the Interior for his approval the absence of his approval would defeat the suit, when of course no one would want to bring a suit if he had that approval. * * * A strong argument is made tending to show that power should be vested in the President or some other officer of the Government to withhold from allotment lands specially needed for the use of the tribe as a whole, but such argument should be addressed to Congress rather than to the Courts. If such a law would be wise that is no reason why an executive department should make one, or the courts sustain it in doing so."

Henry Gas Co. vs. United States, 191 Fed. 132:

"It is true that the Secretary of the In-

terior may prescribe reasonable rules and regulations not inconsistent with or contrary to the Law of Congress under which allotments shall be made; but this does not authorize him to withhold an allotment altogether from one shown by the rolls to be entitled thereto. *Morrill vs. Jones,* 106 U. S. 466, 27 L. Ed. 267; *Quinn vs. Chapman,* 111 U. S. 445, 28 L. Ed. 476; *United States vs. Symonds,* 120 U. S. 46, 30 L. Ed. 557; *Hartman vs. Warren,* 76 Fed. 157; *Leecy vs. U. S.* 190 Fed. 289. The enrollment within the time required and as of the date fixed determines the right of the citizen to an allotment AND THE FAILURE BEYOND A REASONABLE TIME after its approval by the Secretary of the Interior to make the allotment and issue the proper evidence thereof cannot operate to deprive him of the right thereto."

In *St. Louis Ind. Pack. Co. vs. Houston,* 215 Fed. 559, the Leecy case is cited with approval. The Court says:

> "It is within the power of Congress to vest in executive officers the power to promulgate administrative rules, but this never is deemed to extend to the making of rules to subvert the statute."

See:

Ballinger vs. U. S., 216 U. S. 240, 54 L. Ed. 464;
Wood vs. Gleason, 140 Pac. 418;
Garfield vs. Goldsby, 21 U. S. 249, 53 L. Ed. 168.

In the case of *United States vs. Paine Lumber*

Co., 206 U. S. 467, 51 L. Ed. 1139, the decision of the Circuit Court which held the Munsee Indians had the right to cut and sell timber from allotments for which no patents had been issued was affirmed.

From the adjudicated cases it would seem the refusal to allot land upon which merchantable timber is growing is an attempted innovation, wholly without law or precedent. Appellant's brief fails to point out, and Appellee does not know why or under what authority he is excluded for years from lands sorely needed for a home.

In *Bonnifer vs. Smith,* 166 Fed. 846, it was held rights to an allotment date from the time selection is made. In the same case in the lower court, 154 Fed. 883, it was held that all the Indians are entitled to participate in allotments.

See also, *Oaks vs. U. S.,* 172 Fed. 305.

Appellee testified through an interpreter as follows (R. 35):

> "The plaintiff has supported his family on fishing and seal hunting, but those things are all played out, and in a few years they don't know what they are going to do. The Indians used to hunt sea otter years ago, but that is all gone. These big purse seine companies have gotten so thick now that the Indians' fish that used to

> be in the water are pretty nearly all destroyed, and the white people have fished out the Quileute River that runs down by their reservation. Plaintiff feels sure he can support his family if given the right to that land."

Our first territorial governor was killed in the battle of Chantilly in the War of the Rebellion. His promises solemnly made to and relied upon by these people have not been kept. They sacrificed millions of acres of the same character of land relying upon the faith of a solemn treaty. For sixty-six years these hardy people have watched the tides of the Pacific and the years come and go, but the Great Father at Washington has been unmindful of the promises of the dead governor killed in action while honorably serving his country at the head of his troops.

When suit is finally brought by one of these people in a court of equity to obtain his rights, a wholly illegal, unjust makeshift of a defense is interposed.

The approval of this court should be added to the decree of the trial court awarding Appellee justice long delayed.

Respectfully submitted,

GRIFFIN & GRIFFIN,
Attorneys for Appellee.

No. 3899

United States

Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

A. O. ANDERSEN COMPANY, a Corporation, Claimant of 1974 Cases Canned Salmon Labelled in Part "Hypatia Brand Pink Salmon" Shipped by ALASKA HERRING & SARDINE COMPANY CANNERY,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3899

United States

Circuit Court of Appeals

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THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

A. O. ANDERSEN COMPANY, a Corporation, Claimant of 1974 Cases Canned Salmon Labelled in Part "Hypatia Brand Pink Salmon" Shipped by ALASKA HERRING & SARDINE COMPANY CANNERY,
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page.

Names and Addresses of Counsel.

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Plaintiff in Error,
310 Federal Building, Seattle, Washington.
JUDSON F. FALKNOR, Esq., Assistant United States Attorney, Attorney for Plaintiff in Error,
310 Federal Building, Seattle, Washington.
Messrs. KERR, McCORD & IVEY, Attorneys for Defendant in Error,
1309 Hoge Building, Seattle, Washington.

[1*]

United States District Court, Western District of Washington, Northern Division.
November Term, 1920.

No. 5829.

UNITED STATES OF AMERICA,
Libellant,

vs.

1974 CASES CANNED SALMON Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery.

Libel of Information.

To the Honorable Court Above Named:

The United States of America, by Robert C. Saunders, United States Attorney for the Western District of Washington, respectfully shows:

---

*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That libelant above named, in its own right, prays for the seizure and condemnation of certain articles which may be used either as a food or as a drug, to wit: 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon".

II.

That libellant is informed and believes and therefore alleges that the said 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" have been shipped from Port Walter, Alaska, to the City of Seattle, in the State of Washington, via Apex Fish Company Motor Ship and reshipped via steamer "Wakina", arriving at Seattle on or about August 7th, 1920, in interstate commerce via said steamers, which said shipment is now in the same condition in which it was shipped from Port Walter, Alaska, to Seattle, in the Northern Division of the Western District of Washington, and has always remained since said shipment in the same condition in which it is now. [2]

III.

That libelant is informed and believes, and upon such information and belief alleges, that the said 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" are adulterated, under the provisions of Section 7, Food and Drug Act, paragraph Sixth, under Food, of the Act of Congress of June 30, 1906, known as the Food and Drug Act, in that they consist wholly or in part of filthy, decomposed and putrid animal substance.

IV.

That said 1974 Cases Canned Salmon Labeled in

Part "Hypatia Brand Pink Salmon" constituted interstate shipments from Port Walter in the Territory of Alaska, to Seattle, in the State of Washington, in interstate commerce, as above set forth, and that the above described salmon is now within the jurisdiction of this Honorable Court in the original unbroken packages.

V.

That the source of libellant's information is an official communication by wire received from the Acting Secretary of Agriculture under date January 22d, 1921, which said communication is hereto attached by copy and made a part of this libel, marked Exhibit "A" and made a part hereof as though set out in full.

WHEREFORE, in consideration of the premises, your libellant prays that said articles which may be used either as a food or as a drug, consisting of 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" may be proceeded against and seized for condemnation in accordance with Act of Congress approved June 30, 1906, and to this end this Honorable Court may issue the process of attachment in due process of law according to the course of this Honorable Court in cases of admiralty and maritime jurisdiction, as far as practicable in this case, and that all persons, firms and corporations, having or pretending to have, any right, title or claim in and to said shipment of salmon, which may be used either as a food or as a drug, above mentioned, may be cited to appear herein and answer all and singular the premises aforesaid, and that if the said

persons, firms or corporations cannot be found, they may be cited to appear by process of publication [3] in the manner provided by law;

That by an appropriate order this Honorable Court may adjudge and decree that the said articles of food and drug hereinbefore particularly described and mentioned, be condemned at the suit of this libellant, according to the provisions of the Act of Congress hereinbefore set forth, that this Honorable Court may pass all such orders and decrees and judgments as may be necessary in the premises, and may grant your libellant a decree for the costs of this proceeding against the owners or holders of said articles condemned, should such costs not be justified out of the proceeds of the sale, and that your libellant may have such other and further relief as the nature of the case may require.

ROBT. C. SAUNDERS,
United States Attorney.
CHARLOTTE KOLMITZ,
Assistant United States Attorney. [4]

United States of America,
Western District of Washington,
Northern Division,—ss.

Edward A. McDonald, being first duly sworn, upon his oath deposes and says: That he is inspector in the Bureau of Chemistry, United States Department of Agriculture, at Seattle, Washington; that he has read the foregoing libel and knows the contents thereof and that the same is true of his own knowledge, except as to those matters which are therein

stated on information and belief and that as to those matters he believes it to be true.

EDWARD A. McDONALD,

Subscribed and sworn to before me this 24th day of January, 1921.

[Seal] FRANK L. CROSBY, JR.,

Deputy Clerk, U. S. District Court, Western District of Washington. [5]

Exhibit "A."

Washington DC 540 pm Jan 22 1921

Saunders

United States Attorney Seattle Wn

There are at Seattle possession A O Anderson and Company nineteen hundred and seventy four cases canned salmon labeled part quote 4 dozen 1 pound talls Hypatia Brand Pink Salmon packed for J L Smiley and Company Seattle Washington (can) Hypatia Brand Pink Salmon contents 1 pound packed for J L Smiley and Co Seattle U S A unquote shipped by cannery of Alaska Herring and Sardine Company from Port Walter Alaska between June twenty eight and November seventh ninteen via Apex Fish Company motor ship and reshipped by steamer Wakina about August seventh twenty Examination sample Bureau Chemistry shows nineteen point four per cent cans examined decomposed some putrid tainted or stale product adulterated violation Section seven Food and Drugs Act paragraph sixth under Food in that it consists wholly or in part of filthy decomposed and putrid animal substance Evidence analysis furnished by Arthur W Hansen of interstate shipment Edward

A. McDonald who will call and identify goods Consignment subject seizure and confiscation Section ten Department requests immediate seizure Wire action taken Food and Drugs fourteen two six two.

E D BALL,
Acting Secretary

332 PM.

Filed in the United States District Court, Western District of Washington, Northern Division, January 25, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

United States District Court for the Western District of Washington.

No. 5829.

UNITED STATES OF AMERICA

vs.

1974 CASES CANNED SALMON, Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska Herring & Sardine Co. Cannery.

Praecipe for Monition and Attachment.

To the Clerk of the Above-entitled Court:

You will please issue a monition and attachment.

CHARLOTTE KOLMITZ,
Asst. United States Attorney. [7]

No. 5829. United States District Court, Western District of Washington. United States of America, vs. 1974 Cases Canned Salmon, Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska

Herring & Sardine Co. Cannery. Praecipe for Process, etc.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, January 25, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

No. 5829.

Monition and Attachment.

Western District of Washington,—ss.

The PRESIDENT of the UNITED STATES OF AMERICA to the Marshal of the United States for the Western District of Washington, GREETING:

WHEREAS, a Libel hath been filed in the United States District Court for the Western District of Washington, on the 25th day of January, in the year of our Lord one thousand nine hundred and twenty-one, by United States of America, against 1974 Cases Canned Salmon, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring and Sardine Co. Cannery, for the reasons and causes in the said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons interested in the said Salmon, etc., may be cited in general and special to answer the premises, and all proceedings being had that the said salmon, etc., may for the causes in the said libel mentioned, be condemned and sold to pay the demands of the Libellant.

YOU ARE THEREFORE HEREBY COMMANDED to attach the said salmon and to retain the same in your custody until the further order of the Court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said Court, to be held at Seattle, Washington, in the Western District of Washington, on the 10th day of February, A. D. 1921, at ten o'clock in the forenoon of the same day, if that day shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof together with this writ.

WITNESS, the Hon. EDWARD E. CUSHMAN, Judge of said Court, at the city of Seattle, in the Western District of Washington, this 25th day of January, in the year of our Lord one thousand nine hundred and twenty-one and of our independence the one hundred and forty-fifth.

[Seal] F. M. HARSHBERGER,
Clerk.
By FRANK L. CROSBY, Jr.,
Deputy Clerk.

ROBT. C. SAUNDERS,
Proctor for Libellant. [9]

Office of U. S. Marshal,
Western District of Washington,—ss.

In obedience to the within monition, I attached the 1963 cases salmon therein described, on the 25th day of January, 1921, and have given due notice to all persons claiming the same that this Court will, on the 10th day of February, 1921 (if that day should be a day of jurisdiction, if not, on the next day of jurisdiction thereafter), proceed to the trial and condemnation thereof should no claim be interposed for the same.

Date Jan. 25, 1921.

JOHN M. BOYLE,
U. S. Marshal.
By F. J. COLLIGAN,
Deputy Marshal.

Marshal's Fees and Expenses.

For Serving Attachment and Monition.....	$2.00
Miles traveled, 4, at 6 cents per mile.....	.24
Preparing Notice of Seizure for posting.....	....
Preparing Copy of Notice of Seizure for Publisher	....
Publishing Notice of Seizure, Journal of Commerce	3.00
Posting Notice of Seizure	....
Percentage on $ at per cent.	....
Keeper's Fees day at $2.50 per day....	....
Releasing Vessel	....
Total	$5.24

No. 5829. United States District Court, Western District of Washington, Northern Division. United States of America, Plaintiff, vs. 1974 Cases Canned Salmon, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery. Monition and Attachment. Issued January 25, 1921. Returnable February 10, 1921. Nature of cause and amount —. Act of June 30, 1906. Robt. C. Saunders, Proctor for Libellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 16, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libellant,

vs.

1974 CASES CANNED SALMON, etc.,
Respondent.

Claim of A. O. Andersen & Co.

Comes now A. O. Andersen & Co., a corporation, organized and existing under and by virtue of the laws of the State of Oregon, and alleges that it is the owner of all of the salmon referred to in the libel

filed herein and asserts its claim to said salmon and each and every part thereof.

KERR, McCORD & IVEY,
Attorneys for A. O. Andersen & Co.

United States of America,
Western District of *America,*
Northern Division,—ss.

A. B. Natland, being first duly sworn on oath, deposes and says: That he is Seattle Manager of A. O. Andersen & Co., a corporation, the claimant above named; that he has read the foregoing claim; knows the contents thereof and believes the same to be true.

[Seal] A. B. MATLAND.

Subscribed and sworn to before me this 28th day of January, 1921.

[Notarial Seal] MILLARD P. THOMAS,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 5, 1921. F. M. Harshberger. By S. E. Leitch, Deputy. [11]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES CANNED SALMON, Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska Herring & Sardine Co. Cannery,

Respondent.

Answer of A. O. Andersen Company.

Comes now the claimant, A. O. Andersen Company, and answering the libel on file herein, for cause of answer says:

I.

Answering paragraph I of the libel, this claimant admits the same.

II.

Answering paragraph II of the libel, this claimant admits that the salmon therein referred to was shipped from Alaska, but denies each and every other allegation therein contained.

III.

Answering paragraph III of the libel, this claimant denies the same and each and every part thereof.

IV.

Answering paragraph IV of the libel, this claimant admits that the salmon referred to in said paragraph

was purchased by the claimant, but denies each and every other allegation in said paragraph contained.

V.

Answering paragraph V of the libel, this claimant says that it has neither information nor knowledge sufficient to form a belief as to the truth or falsity of the matters and things therein set forth and therefore denies the same and each and [12] every part thereof.

KERR, McCORD & IVEY,
Attorneys for Claimant.

United States of America,
Western District of Washington,
Northern Division,—ss.

F. W. Perry, being first duly sworn, deposes and says: That he is Seattle Manager of A. O. Andersen Company, the claimant in the above-entitled action; that he has read the foregoing answer, knows the contents thereof and believes the same to be true.

F. W. PERRY.

Subscribed and sworn to before me this 9th day of February, 1921.

[Seal] MILLARD T. THOMAS,
Notary Public for Washington, Residing at Seattle.

Received a copy of the within answer this 9th day of February, 1921.

ROBT. C. SAUNDERS,
Attorney for Libellant.
By E. D. DUTTON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 9, 1921. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON, Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska Herring & Sardine Co. Cannery,
Respondent,

A. O. ANDERSON CO., a Corporation,
Claimant.

Demand for Jury.

To the Above-named Claimant and Messrs. Kerr, McCord & Ivey, Its Attorneys:

You and each of you will pleace take notice that the libelant herein elects to have this cause tried to a jury and hereby demands a jury to try the issues of fact as framed by the pleadings in this cause.

Dated this 16th day of June, 1922.

THOMAS P. REVELLE,
United States Attorney,
JUDSON F. FAULKNOR,
Assistant United States Attorney,
Attorneys for Libelant.

Receipt of copy of the above demand is hereby acknowledged this 16th day of June, 1922.

KERR, McCORD & IVEY,
Attorneys for Claimant.
By L. FERGUSON.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 16, 1922, F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON, Labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery,
Respondent.

Verdict.

We, the jury in the above-entitled cause, find the respondent 1974 Cases Canned Salmon, Labeled in part "Hypathia Brand Pink Salmon" not guilty as charged in the libel of information filed herein, being instructed by the Court so to do.

W. G. POTTS,
Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libelant,

vs.

1974 CASES CANNED SALMON, Labeled in part "Hypathia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery,

Respondent.

A. O. ANDERSON COMPANY,

Claimant.

Decree.

This cause having come on for hearing and trial before a jury on the 20th day of June, 1922, during the May, 1922, Term of this Court, the United States of America appearing by Mr. Thomas P. Revelle, United States Attorney, and Mr. Judson F. Faulknor, Assistant United States Attorney, for the Western District of Washington, and the A. O. Anderson Company, claimant, appearing by Messrs. Kerr & McCord, and the Government having introduced its evidence in support of the allegations of the libel, and the claimant having moved the Court to direct

the jury to return a verdict of not guilty on the ground that the Government had introduced no evidence that would justify the submission of the case to the jury or introduced no evidence tending to sustain the allegations of the libel, and the Court having granted said motion and the jury having returned a verdict of not guilty in compliance with said instructions by the Court; [16]

WHEREBY, it is ORDERED, ADJUDGED and DECREED that the said libel against the said 1974 Cases Canned Salmon, labeled in part "Hypathia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery, be dismissed; and it is further

ORDERED, that the United States Marshal for the Western District of Washington shall deliver to the said claimant the said 1974 Cases Canned Salmon, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery.

Whereupon, the libelant duly excepted to the aforesaid order, judgment and decree, which exception is hereby allowed.

Done in open court this 24th day of June, 1922.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—KERR & McCORD,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES SALMON.

Order Extending Time Thirty Days to File Bill of Exceptions.

Upon motion of the United States Attorney, it is hereby ordered that the time for filing bill of exceptions in the above-entitled cause may be extended for a period of thirty days from this date.

Dated this 21st day of June, 1922.

EDWARD E. CUSHMAN,
United States District Judge.

O. K.—KERR, McCORD & IVEY,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 21, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [18]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES OF SALMON, etc.,

Respondent.

Order Extending Time to and Including July 31, 1922, to File Record in Circuit Court of Appeals.

BE IT REMEMBERED that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended;

NOW, THEREFORE, IT IS HEREBY ORDERED AND AJUDGED that the date and time for filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby extended to and including the 31st day of July, 1922.

Done in open court this 19th day of July, 1922.

EDWARD E. CUSHMAN,
Judge, U. S. District Court.

Approved:

KERR, McCORD & IVEY,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON, labeled in part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery,
Respondent.

A. O. ANDERSON & COMPANY,
Claimant.

Petition for Writ of Error.

To the Honorable Edward E. Cushman, Judge of the United States District Court for the Western District of Washington:

Comes now the libelant, by its attorneys, Thomas P. Revelle, United States Attorney, and Judson F. Falknor, Assistant United States Attorney, for the Western District of Washington, and respectfully shows that on the 24th day of June, 1922, final judgment was entered against your petitioner dismissing its libel against 1974 Cases Canned Salmon, labeled in

part "Hypatia Brand Pink Salmon," shipped by Alaska Herring & Sardine Co. Cannery.

Your petitioner, feeling itself aggrieved by said judgment entered as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit under the laws of the United States in such cases made and provided. [20]

WHEREFORE, the premises considered, your petitioner prays that a writ of error be issued and that an appeal in this behalf to the Circuit Court of Appeals aforesaid sitting in San Francisco, in said circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made staying all further proceedings until the determination of said writ of error by said Circuit Court of Appeals, and that a transcript of the record, papers and proceedings in this cause, duly authenticated, may be sent to said Circuit Court of Appeals.

Dated this 24th day of June, 1922.

THOMAS P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

Received a copy of the within petition this 23d day of June, 1922.

KERR & McCORD,
Attorneys for Respondent and Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division, Jun. 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch Deputy. [21]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery,
Respondent,

A. O. ANDERSON COMPANY,
Claimant.

Assignments of Error.

Comes now the above-named libelant, the United States of America, by its attorneys, Thomas P. Revelle, United States Attorney, and Judson F. Falknor, Assistant United States Attorney, for the Western District of Washington, and in connection with its petition for writ of error in this case submitted and filed herewith, assigns the following errors which the libelant avers and says occurred in the proceedings and at the trial of the above-entitled cause in the above-entitled court, upon which it relies to reverse, set aside and correct the judgment and decree entered herein. It says that there is manifest error appearing upon the face of the records and in the proceedings in this:

I.

That the claimant at the close of the Government's evidence moved the court to direct the jury to return a verdict of "not guilty" on the ground that the Government had introduced no evidence which would justify the submission of the case to the jury, and that the Government had introduced no evidence tending to sustain the allegations of the libel, which motion [22] was granted by the Court, and to which ruling the libelant then and there duly excepted; which exception was by the Court allowed; and now the libelant assigns as error the ruling of the Court upon said motion.

II.

That the Court thereafter in accordance with the directed verdict of "not guilty" returned by the jury, entered a judgment against said libelant dismissing said libel, to which ruling and judgment the libelant then and there duly excepted; which exception was by the Court allowed; and now the libelant assigns as error the entering of such judgment against said libelant dismissing said libel.

As to each and every assignment or error as aforesaid libelant says that at the time of making the order or ruling of the Court complained of, the libelant duly asked and was allowed an exception to the ruling and the order of the Court.

THOMAS P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

Service of the foregoing assignments of error received and copy thereof admitted this 23d day of June, 1922.

KERR & McCORD,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

In the United States District Court for the Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery,
Respondent,

A. O. ANDERSON COMPANY,
Claimant.

Order Allowing Writ of Error.

Now, on this 24th day of June, 1922, came the libelant by its attorney Thomas P. Revelle, United States Attorney for the Western District of Washington, and Judson F. Falknor, Assistant United States Attorney for said district, and filed herein and presented to the Court its petition praying for the

allowance of a writ of error intended to be urged by it, and praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises, and that an order be made staying all further proceedings until the determination of said writ of error by the said Circuit Court of Appeals;

NOW, on consideration of said petition and being fully advised in the premises, the Court does hereby allow the said writ of error:

AND IT IS HEREBY ORDERED that all further proceedings are hereby suspended herein until the determination of the said writ of error by the said Circuit Court of Appeals.

EDWARD E. CUSHMAN,

Judge, United States District Court for the Western District of Washington.

[Endorsed]: Filed in the United States District, Court, Western District of Washington, Northern Division, June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES CANNED SALMON Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery,
Respondent,

A. O. ANDERSON COMPANY,
Claimant.

Bill of Exceptions.

BE IT REMEMBERED that on the 20th day of June, 1922, the above-entitled cause came on regularly for trial before the Honorable Edward E. Cushman, Judge of the above-entitled court. The United States appeared by its District Attorney and the claimant A. O. Anderson Company appeared by its attorneys, Mr. E. S. McCord and Mr. Otto B. Rupp. Thereupon a jury was duly impaneled and sworn to try the cause. The following witnesses on behalf of the United States were then sworn and testified in substance as follows:

Testimony of E. A. McDonald, for Libelant.

E. A. McDONALD, having been sworn, testified as follows on behalf of the libelant:

That he is employed by the United States in the Bureau of Chemistry and has been so employed since

(Testimony of E. A. McDonald.)

1907, being stationed during that entire time in Seattle; that prior to his employment by the Government he was engaged in similar work for the State [25] of Washington in the capacity of State Food Commissioner. That he took an investigational sample, No. 22747, from the salmon forming the subject of the controversy, which said investigational sample consisted of 24 cans taken from 24 cases. This investigational sample was taken January 3, 1921; that an investigational sample is customarily taken by the Government to determine whether a final sample will be taken, that is, whether the first sample is sufficiently decomposed to warrant the taking of another sample; that the investigational sample is generally taken from the top of the pile or parcel but that they probably skip around so as to cover the whole pile. The 24 cans were taken from 24 cases from the top of the pile, one can from each case, so that the investigational sample represented samples from 24 cases. This investigational number was marked on the cans and the sample was taken to the United States Food and Drug Laboratory. That on January 5, 1921, on account of the quality of the first investigational sample, witness took what is known as a final sample; that he was very careful to cover the entire pile, to go into it very exhaustively, covering the top, going down on the sides to the lower tier and on the other side, judging largely by the parcel as to where it is located in the warehouse. That his aim was to get a representative sample of the entire pile. This final sample consisted of 192 cans from 192 cases. Witness

(Testimony of E. A. McDonald.)

put his hand in each case and picked out a can. If the can appeared to be a swell he didn't take that because that generally is eliminated in a commercial way. This final sample was given the number 10533-T and the cans were marked then with that number on them and were delivered to the Pure Food and Drug Laboratory at Seattle. That no further samples [26] were taken until after the seizure of the salmon. That after the seizure of the salmon what is known as a post seizure sample was taken in co-operation with the owner of the salmon or his representative. That this sample was taken under a court order which authorized both the claimant and witness to be there and take samples at the same time, which was done. Mr. Monroe was there representing the claimant. Witness and Mr. Monroe agreed which cases should be selected, and they selected 192 cases over the whole pile. These were representative cases. That in the interim between the taking of sample No. 10533-T and the taking of the post seizure sample the salmon was moved from one part of the warehouse to another and spread out over a larger territory, and that Mr. Monroe and witness, after looking it over decided that they would get the most representative sample from taking it entirely off the top, being careful that they did not take any from any case that had been opened before, so that the second 192 cans obtained in the post seizure sample represented cans from 192 cases that had not been opened before. That approximately 400 cases of salmon were opened and a can taken from each case; that between the time

(Testimony of E. A. McDonald.)

of the taking of the first sample of 192 cans and the second sample of 192 cans the pile had been spread over a larger area and that witness and Mr. Monroe, representing the claimant, agreed on which 192 cases would be selected for the post seizure sample, both witness and Monroe taking a can from each of the said 192 cases; that this post seizure sample was given the number I. S. 14049-T, and the cans were so marked and delivered to the laboratory at Seattle. [27]

On cross-examination witness testified as follows: Witness did not examine the salmon himself but just selected it. The post seizure sample of 192 cans was taken June 14, 1922. Each case was opened and one can was taken by witness from the case and one by Mr. Monroe side by side so that witness only took to make up the sample one can out of each case, examining only in the post seizure sample 192 cases; that these cans were taken from the top of the pile. That the witness and Monroe took the cans from the top of the pile because they knew that they would be the most representative. The pile was about eight cases high and in width 14 cases one way by 16 the other. Witness did not attempt to go into the interior of the pile but took it from the top. Witness knows that the pile was moved. The investigational sample was delivered to Mr. Higgins. The second sample was delivered to Mr. Hansen, and the post seizure sample was delivered to Mr. Dill. Witness did not take a receipt for them. They were all marked so that they could be identified.

(Testimony of E. A. McDonald.)

On redirect examination witness testified as follows: Witness makes the statement that the sample was taken entirely off the top of the pile; he refers to the post seizure sample. Referring to sample No. 10533-T where 192 cans were taken, these cans were taken not only from the top of the pile but along the sides and from the bottom tier. The taking of the 192 cans of the last sample from the top of the pile was done with the consent of the claimant represented by Mr. Monroe, who took the samples with witness. [28]

On recross-examination witness testified as follows: At the time of the taking of the first 192 cans sample No. 10533-T no one was present representing the claimant. At that time witness thought it wise in taking the samples to go down the sides of the pile on each side. Witness does not recall exactly from what part of the parcel the cases were taken, although following the usual rule he would say that 192 cans were taken from the side and top of the parcel one can out of each case.

Testimony of Arthur W. Hansen, for Libelant.

ARTHUR W. HANSEN was sworn and testified on behalf of the libelant as follows:

That he is in charge of the United States Food and Drug inspection station at Seattle in the employ of the United States Government; that he has been in charge of the local station since August 1, 1919; that the most important part of his business since that time has been to examine and analyze the contents of interstate shipments of food and drugs. (There-

(Testimony of Arthur W. Hansen.)

upon, claimant, admitted that witness was a qualified chemist.) That there was turned over to witness' department investigational sample No. 22747 consisting of 24 cans of pink salmon and was delivered for analysis to one H. G. Higgins, a Government chemist employed in witness' laboratory; that Higgins analyzed said sample and turned over to witness his official report. That Higgins is now in San Francisco but that witness has his report with him.

Thereupon, the following proceedings were had, to-wit: [29]

Q. Will you produce it, please?

A. (Witness produces paper.)

Mr. FALKNOR.—I offer this in evidence.

Mr. McCORD.—I object to the introduction of it as not the best of evidence, and as hearsay.

Mr. Higgins examined the salmon,—made the examination himself.

The COURT.—He can refresh his memory from the report but I don't understand it is original evidence.

Mr. FALKNOR.—It is a permanent record of the Department made by the chemist.

The WITNESS.—Yes.

The COURT.—I will sustain the objection.

Q. (Mr. FALKNOR.) Refreshing your recollection from this paper, I will ask you what the analysis from your department shows of these 24 cans of salmon.

Mr. McCORD.—I would like to ask you if you are basing your opinion upon what you see in that paper

(Testimony of Arthur W. Hansen.)

before you, or are you reaching your conclusion and testifying from what you know independent of that.

The WITNESS.—I personally recollect that Mr. Higgins examined the preliminary sample in this case, but the percentages and results of the analysis would be from this paper.

Mr. McCORD.—You have no independent recollection other than this statement or from what he told you.

The WITNESS.—I have the general recollection that his results warranted the collection of a final sample. [30]

Mr. McCORD.—I object to it.

The COURT.—I don't see any other way to get at it.

Objection overruled.

Q. (Mr. FALKNOR.) What did this examination show, Mr. Hansen as to the number of putrid and tainted cans in that 24 can lot?

Mr. McCORD.—This is the same thing that your Honor ruled out a moment ago.

The COURT.—Well, no. You made this record yourself?

Mr. McCORD.—No.

WITNESS.—No, sir, this record was made by Mr. Higgins and turned over to me.

The COURT.—Objection sustained.

Q. (Mr. FALKNOR.) Mr. Hansen, whatever the results were of this investigation sample, you considered the results sufficient to justify you taking a larger and more representative sample?

(Testimony of Arthur W. Hansen.)

Mr. McCORD.—I object to that as not proper.

The COURT.—Objection sustained. If they took the next sample, I don't see as it would make any difference what the reason was for it. [31]

That there was delivered to witness interstate sample No. I. S. 10533-T consisting of 192 cans; that 144 cans of said sample were examined by witness and 48 cans of said sample were preserved for subsequent analysis. Witness personally examined said 144 cans. That the sample was examined by the usual method followed in the commercial examination of salmon. Each can was opened and a careful note made as to odor and to the physical appearance of the same, it being a purely physical test. That of the 144 cans witness found from his examination a total of 28 putrid or tainted cans and 18 stale cans, that is, besides the 28 putrid cans there were 18 others that witness classified as stale, that is, showing initial decomposition. That a putrid can is one that by its odor is offensive to the sense of smell and contains rotten, decomposed salmon. That a stale can is one that clearly shows the beginning of decomposition but not in an advanced stage. That in counting his percentage witness did not count the stale cans. Witness found from his examination of said 144 cans 19.3 per cent of putrid, rotten or tainted cans. That witness has had practical experience in experimenting as to the result of canning salmon in different degrees of decomposition. That his experiments consisted of observations of a number of experiments conducted in the canneries and the laboratories, of salmon which immediately

(Testimony of Arthur W. Hansen.)

after being taken from the water was placed under observation and held under conditions closely approximating those obtaining in the salmon cannery. At regular intervals portions of the raw salmon were examined by chemical methods and the usual observation methods. Witness states that he arrived [32] at his conception of a tainted can or a putrid can or a stale can of salmon by actual experiments conducted on salmon. That decomposed salmon was canned and the cans were later cut and examined and witness found that when he canned rotten decomposed salmon he would get rotten decomposed salmon out of the can and would get the same kind of putrid salmon that he found in one of the cans classified as "putrid" in the sample referred to. That the finding of putrid or decomposed salmon in a can examined would indicate that putrid or decomposed salmon had been canned. That the 48 cans which were preserved for future analysis were examined on June 17, 1922, by witness and that there were also present at said examination the following named persons who also examined said 48 cans: Mr. Dill of the local laboratory, Dr. Johnson of the University of Washington, Dr. Hunter and Dr. Balcom of the Bureau of Chemistry at Washington, D. C., the last two mentioned persons having come from Washington to assist in the examination. That witness found from his examination of said 48 cans, eight of said cans, or 16.6 per cent to be putrid or tainted and one can to be stale. These 48 cans were also examined by the other persons present. Witness also examined post seizure sample No. I. S.

(Testimony of Arthur W. Hansen.)

14049-T consisting of 192 additional cans. This post seizure sample was delivered to witness by Mr. McDonald of the local laboratory. The post seizure sample was also analyzed on June 17, 1922, by witness and by the other chemists and experts heretofore mentioned. That from his examination of said 192 cans of said post seizure sample witness found 35 cans to be putrid or tainted and 12 additional cans stale or partly decomposed. [33] Recapitulating, witness stated that altogether he examined a total of 384 cans, of which he found 71 to be putrid or tainted, or 18.4 per cent putrid or tainted, and in addition found 31 cans, or 8 per cent, to be stale, making a total of stale and putrid cans of 26.4 per cent.

On cross-examination witness testified as follows: The only salmon which witness personally examined were the two parcels of 192 cans each, one taken in January, 1921, and the other taken in June, 1922. At the time of the examination of the last 192 can sample on June 17, 1922, there were present besides witness Mr. Dill of the local pure food laboratory, Dr. Johnson of the University of Washington, and Dr. Hunter and Dr. Balcom, both from the office of the Bureau of Chemistry at Washington, D. C. The cans were examined independently by each of the persons present. In the examination the cans were divided up into parcels of one dozen each, each man keeping his own record. Witness kept his record in twelves. Cans were poured into twelve receptacles around the table and each person went around one following the other

(Testimony of Arthur W. Hansen.)

and examined each receptacle independently. Of the first twelve cans examined by witness one was found putrid, one tainted and none stale. In the second parcel of twelve witness found one putrid, three tainted and no stale cans; in the third parcel of twelve witness found one putrid, one tainted and one stale can. In the fourth parcel of twelve witness found three putrid, no tainted, and one stale. In the fifth parcel of twelve witness found 1 putrid, two tainted and no stale cans. In the next parcel of 12 witness found no putrid, no tainted and no stale cans. In the seventh parcel of twelve witness found three putrid, [34] no tainted, and no stale cans. Referring to the seventh parcel of twelve, the remaining nine cans were just fair salmon, that is, it was not salmon that could be classed as either putrid, tainted or stale and was salmon that was marked under the rules and regulations of witness' department. In the next parcel of twelve witness found one putrid, four tainted and one stale can. In the ninth parcel of twelve witness found one putrid, no tainted and no stale can. In the tenth parcel of twelve witness found one putrid, one tainted and one stale can. In the eleventh parcel of twelve witness found no putrid, two tainted and no stale cans. In the twelfth parcel of twelve witness found no putrid, one tainted and two stale cans. In the thirteenth parcel of twelve witness found no putrid, two tainted and two stale cans. In the fourteenth parcel of twelve witness found one putrid, one tainted and one stale can. In the fifteenth parcel of twelve witness found no putrid, two tainted and two stale cans. In the six-

(Testimony of Arthur W. Hansen.)

teenth parcel of twelve witness found one putrid, one tainted, and one stale can. In the aggregate of this sample witness found 14 putrid, 21 tainted and 12 stale cans, 7.2 per cent putrid, 10.9 per cent tainted, and 6.2 per cent stale, so that witness found 18.2 per cent putrid and tainted cans. By a putrid can witness means one that has a decidedly offensive odor that one would recognize if he knew anything about salmon. Witness thinks anyone that examined it would know that it was bad. Witness does not include in his classification a group known as "slightly tainted." It is sometimes the case that one man might say a can was tainted and another might not. There is a little variation between [35] examiners. The odor from the tainted cans is the same as the putrid only not quite so pronounced. Witness could not say that an ordinary person could tell a tainted can. The difference between a tainted can and a stale can is a matter which each man has to determine for himself and which witness has determined by actual experience. Witness has a definite basis upon which he forms his classifications.

Thereupon the following proceedings were had: [36]

Q. So far as either tainted cans or stale cans are concerned, or the putrid cans,—from your experience in the Bureau of Chemistry, I will ask you if there is any such a thing as poison in the eating of these cans that would cause death or cause sickness?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—Objection overruled.

(Testimony of Arthur W. Hansen.)

Mr. FALKNOR.—Exception.

Q. (Mr. McCORD.) What have you to say about that?

A. I will have to admit that I have not heard of any experiments proving or disproving that question.

Q. And in your whole experience during the time you have been connected with the Bureau of Chemistry handling these food products, have you heard or know of any case where any bad result followed the eating of this tainted salmon?

Mr. FALKNOR.—We make the same objection, if your Honor please.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. I did hear of a case once; but I cannot prove any case, Mr. McCord.

Q. The fact of the matter is it is universally recognized by everybody that if one should eat this tainted salmon he would not suffer.

Q. I don't know that it is recognized. I have heard of one case.

Q. You never knew of that case?

Mr. FALKNOR.—Objected to as immaterial. [37]

The COURT.—Objection overruled.

Q. (Mr. McCORD.) You never knew of a case, did you, Mr. Hansen?

A. I cannot prove a case, no sir.

Q. The only theory upon which you claim that this is not entitled to go into commerce is because it

(Testimony of Arthur W. Hansen.)

is decomposed or putrid? You are not contending here that it is injurious to human health, are you?

Mr. FALKNOR.—I object to the form of this question as to what we are contending. It is a question of law for the Court.

The COURT.—Objection sustained.

Mr. McCORD.—I will withdraw the question.

The salmon was examined like the ordinary salmon packer examines it or any other man engaged in the salmon trade, that is, by the sense of smell. The witness further stated that he did not examine the salmon in question in the capacity of a chemist, but merely examined it as the ordinary salmon packer examines it or any other man engaged in the salmon trade, by the smell. He stated that he did not think it was necessary to resort to chemical analysis. Witness does not think that anyone who has had experience could examine this parcel with the same skill and the same judgment as a man with chemical training. While witness does not mean to state that it is necessary for a man to go through college in order to learn to smell rotten canned salmon, still witness thinks it is necessary for any man to actually conduct experiments on the decomposition of salmon [38] in order to know what he is talking about and in order to arrive at a fair, just basis for judgment. In order for a man to form a just and fair conception of what should be called a tainted or putrid can, he should base that judgment upon actual experiments of decomposed salmon. The commercial buyer who has been spoken of does not necessarily know exactly what

(Testimony of Arthur W. Hansen.)

the contents are. The fact of having opened a lot of canned salmon does not give the information that a few carefully conducted experiments would give the examiner. Witness has examined any number of parcels of salmon that he considers perfect.

Thereupon the following proceedings were had:

Q. The point that I am getting at is this: The Bureau of Chemistry has arbitrarily fixed a standard for tainted goods as to what will be allowed to go into commerce and what will not be allowed to go into commerce? I mean by this that they have established in the case of salmon a standard that any parcel of salmon may be permitted to go into interstate commerce if the tainted cans or stale cans do not exceed ten per cent?

Mr. FALKNOR.—We object to that. We are not insisting upon any standard——

The COURT.—Objection overruled.

Mr. FALKNOR.—There has been no testimony of any such a theory.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. The Bureau of Chemistry does not think it necessary to have any tainted or putrid salmon in canned salmon packs, and it is a fact, however, that the Department has examined [39] parcels of salmon and found certain amounts of bad salmon in it, and for one reason or another has passed them as you say.

Q. (Mr. McCORD.) They have passed them, haven't they, Mr. Hansen, up to ten per cent?

(Testimony of Arthur W. Hansen.)

Mr. FALKNOR.—The same objection.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. I believe that it is possible that they have passed them in the past because conditions were probably such that they just simply felt it to be unwise to proceed against it. That may be the case.

Mr. McCORD.—That was always predicated upon the theory that it was not injurious to health, wasn't it?

Mr. FALKNOR.—Same objection.

The COURT.—Objection overruled.

A. I don't believe it, Mr. McCord.

Q. (Mr. McCORD.) In other words, if this salmon was injurious to health and ten per cent of it was bad so as to kill people you know very well that the Bureau of Chemistry would not permit ten per cent of spoiled salmon to go into the trade?

Mr. FALKNOR.—Objected to as argumentative.

The COURT.—Objection sustained.

Q. Do you recall any particular instance of where the Department of Agriculture or the Bureau of Chemistry permitted salmon to go into the trade where there was ten per cent tainted cans? [40]

Mr. FALKNOR.—Objected to as immaterial, and upon the further ground that it is not proper cross-examination.

The COURT.—Objection overruled. Now, that is a simple direct question. He asked if you know of any case where it would be equal to ten per cent that would be allowed to go into the trade.

(Testimony of Arthur W. Hansen.)

A. I don't know of any cases. I might say that the Bureau of Chemistry would most decidedly object to any percentage of decomposition.

Q. I am asking you this question: Do you know of any canned salmon where the percentage of tainted cans was ten per cent or more that were examined and passed by the Bureau of Chemistry and allowed to go into the trade?

A. I don't recall any such a parcel.

Q. Do you recall a parcel of salmon known as the Myer Salmon in the city of Washington that was allowed to go into the trade when the percentage was ten per cent bad?

Mr. FALKNOR.—I object to that as immaterial.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

A. Are you referring to a ten thousand case parcel that was finally put into fertilizer?

Q. (Mr. McCORD.) No, an eleven thousand case parcel that was passed into the trade.

A. No, I don't know anything about that, Mr. McCord.

Witness has resorted to chemical analysis in other cases to ascertain whether indole or skatole have developed in [41] the salmon. It is a practice of the department to examine only the stale cans for indole and where indole is found in the stale cans it has been classified as tainted. It is the practice in the Seattle laboratory not to examine the tainted cans for indole.

Thereupon the following proceedings were had:

(Testimony of Arthur W. Hansen.)

Q. (Mr. McCORD.) Mr. Hansen, there has been a great deal of salmon examined by you in the last two or three years in Seattle, hasn't there?

A. Yes.

Q. There has been comparatively few parcels examined where the percentage of bad salmon was nothing? In nearly every instance there has been some bad salmon, hasn't there?

Mr. FALKNOR.—Objected to as immaterial and not proper cross-examination.

The COURT.—Objection overruled.

A. I previously stated that I have seen a great many parcels of salmon that cut practically perfect.

Q. (Mr. McCORD.) You have seen a great many that did not cut perfect and you passed them into the trade?

Mr. FALKNOR.—He has been all over that; I object as repetition.

The COURT.—The witness seems very reluctant to give a direct answer to some of these questions. Objection overruled.

Mr. FALKNOR.—I think the witness has answered the questions fairly and candidly, if your Honor please.

Q. (Mr. McCORD.) I will ask you again if you have not passed into the trade salmon that ran from five to seven and eight per cent bad in Seattle in the last two or three years? [42]

Mr. FALKNOR.—I make the same objection.

The COURT.—Objection overruled.

(Testimony of Arthur W. Hansen.)

A. I don't recall of any parcels that ran as high as eight per cent that have been passed, Mr. McCord.

Q. (Mr. McCORD.) What is the highest per cent that you have passed?

A. I don't pass any personally. I might explain that——

Q. I understand that.

A. ——I am working under the direction of the Bureau.

Q. Tell me what percentage of salmon, after you found to be bad in certain parcels seven or eight per cent, that has been released by the Bureau when you reported it to Washington,—put it that way.

A. Well, I think that a very good answer to that question would be about as follows: The Bureau of Chemistry has passed parcels that ran five or six per cent much against its wishes.

He stated that the highest percentage of adulterated salmon that had been passed by the Bureau of Chemistry into the trade was probably about six per cent.

Thereupon the following proceedings were had:

Q. (Mr. McCORD.) I will ask you this question: If six per cent is not a good reason for preventing salmon going into interstate commerce, I will ask you why twelve per cent would be unwise,—bearing in mind all the time that it is not dangerous to human health?

Mr. FALKNOR.—Objected to on the ground that there is [43] no testimony that it is not dangerous to human health. It is objected to also as argumentative.

(Testimony of Arthur W. Hansen.)

The COURT.—Objection sustained.

Mr. McCORD.—Your Honor does not sustain the objection on the ground that it is not testified that it is not dangerous to health?

Q. (Mr. McCORD.) I understood you to say a moment ago that this tainted salmon if one ate it would not injure health.

A. I beg your pardon.

Q. You said you never heard of a case.

The COURT.—He said that he thought he had heard of a case, but could not give the name.

Mr. McCORD.—The only reason I asked this question is I thought maybe I had misunderstood the witness.

Mr. FALKNOR.—I think you did misunderstand him.

The COURT.—Ask another question.

Q. (Mr. McCORD.) I will ask you again, Mr. Hansen, if you have any knowledge of anybody that has ever been injured from eating tainted salmon?

A. I have not.

Q. You know of none and in all of the experience you have had in the Department of Agriculture you never heard of but one instance and in that case you do not remember the name of the party?

A. I never heard of the matter being even investigated.

Q. If it was injurious to health then the Department would not allow six per cent to go into interstate commerce, would it?

(Testimony of Arthur W. Hansen.)

Mr. FALKNOR.—Objected to as incompetent, irrelevant and immaterial.

The COURT.—I will sustain the objection to the question [44] in that form. If he is sufficiently acquainted with the practice and knows whether other food products that are injurious to health,—what the practice has been about condemning them in toto or allowing a percentage to go into the trade, he may state that. I sustain the objection to the question as framed.

Q. (Mr. McCORD.) From your knowledge and experience in the Bureau of Chemistry and investigations as to what is healthy or otherwise and what is proper to go into the trade, I will ask you whether they would permit under their rules and regulations a poisonous substance that was injurious to health to go into the trade?

Mr. FALKNOR.—I object to that as absolutely immaterial. We are concerned with one transaction. And it doesn't make any difference what happened at any other time. There is nothing in the Act about it being injurious to health.

The COURT.—I will overrule the objection. If there is an arbitrary rule that has been adopted about a percentage, the question whether it is so arbitrary as to be unenforceable would be admissible.

Mr. FALKNOR.—We object on the further ground that testimony already shows that it is not up to this witness to determine whether or not anything should be allowed to go into the trade.

The COURT.—Objection overruled.

(Testimony of Arthur W. Hansen.)

A. I am not in position to answer for the Bureau in this matter.

Q. (Mr. McCORD.) You decline to answer the question?

A. As far as I know the Bureau of Chemistry will not permit any food product which contains a poison or deleterious [45] product to go into commerce if it is within its power to prevent it.

Witness' department examines canned tomatoes.

Thereupon the following proceedings were had:

Q. And have passed into interstate commerce a lot of mould tomatoes, don't you?

Mr. FALKNOR.—Objected to as immaterial and not proper cross-examination. I asked a few simple questions about the quality of this particular salmon, not about tomatoes.

The COURT.—Objection overruled.

Mr. FALKNOR.—Exception.

Q. (Mr. McCORD.) What do you understand by the Howard method of examining tomato products?

Mr. FALKNOR.—Objected to as incompetent, irrelevant, immaterial and not proper cross-examination.

The COURT.—I have ruled on the question.

Q. (Mr. McCORD.) Go ahead and tell us about the Howard method of examining tomato products. What is it?

A. It is in brief a microscopic method whereby you get an approximate count or measure of the amount of mold bacteria and mold filament in the tomato by looking through a microscope at a definite amount of the tomato.

(Testimony of Arthur W. Hansen.)

Q. What per cent do you permit to go into the trade,—66 per cent, isn't it, of mold?

Mr. FALKNOR.—Objected to as immaterial unless there is shown some connection between that and——

The COURT.—Objection overruled. [46]

A. There is a standard; published standard.

Q. (Mr. McCORD.) They have this published standard of 66 per cent of mold,—could they permit 67?

A. 66 per cent, I believe it is.

Q. Now, in order to produce 66 per cent of mold as shown by these examinations, what would that percentage be in rotten tomatoes? Ten per cent exactly, wouldn't it?

A. I am not an expert in tomatoes.

Q. You know that 66 per cent,—that is the standard established,—necessarily assumes that about ten per cent,—or exactly ten per cent,—of bad tomatoes are permitted to go into the trade,—is that a fact?

Mr. FALKNOR.—Objected to as immaterial.

The COURT.—There has been a question all through the case about whether an arbitrary standard has been adopted. Objection overruled.

Mr. FALKNOR.—I want to insist again that there is nothing in the Government's case about any standard, about resorting to any rule or standard or regulation or anything else. Note an exception.

Q. (Mr. McCORD.) Can you answer the question?

A. I cannot answer it.

(Testimony of Arthur W. Hansen.)

Q. In reference to this standard of 66 per cent of mold, doesn't it necessarily mean or in fact mean that this is the equivalent of ten per cent of bad tomatoes?

A. I cannot answer that personally. I don't know, Mr. McCord. [47]

Testimony of Dr. Albert C. Hunter, for Libelant.

DR. ALBERT C. HUNTER, after being duly sworn, testified as follows on behalf of the libelant:

That witness is a bacteriologist in the United States Department of Agriculture, Bureau of Chemistry, and has occupied that position for approximately four years. (Thereupon, claimant admitted witness to be a qualified chemist.) That witness is in the employ of the Government and stationed at Washington, D. C. That on the 17th day of June, 1922, witness, together with Mr. Hansen, Mr. Dill, Dr. Balcom and Dr. Johnson, examined 48 cans of canned salmon represented by interstate number 10533-T. From his examination witness found eight of said 48 cans, or 16.7 per cent, to contain putrid or tainted salmon. In addition he found 18.7 per cent to be "off" or stale salmon. By "off" witness means in odor, that it is not good, normal salmon. Witness includes the stale cans in that group, so that besides the 16.7 per cent putrid and tainted salmon witness found in addition 18.7 per cent which was stale or off. Witness was also present on June 17, 1922, when he and the others mentioned examined the post seizure sample of 192 cans represented by interstate number 14049-T. From his examination of the 192 cans he found 39

(Testimony of Dr. Albert C. Hunter.)

cans, or 20.3 per cent to be putrid or tainted. In addition he found 38 cans, or 19.8 per cent which were stale or "off." In the aggregate he examined 240 cans and found 47 which were putrid or tainted and in addition found 47 which were stale or off cans. That during the canning seasons of 1919, 1920, and 1921, witness personally conducted experiments where the salmon were obtained from fish traps under his observation, held out of the water known lengths of [48] time and at regular intervals canned. Before they were canned bacteriological and chemical examination, as well as physical examination, was made. The cans were properly identified, referring back to the age of the fish and the conditions under which it was held, and those cans were later opened and examined. Through those experiments witness and his associates were able to correlate the condition of the canned fish with the condition of the raw fish on the cannery floor before canning. In these experiments he found that fish which was three or four days out of the water got into a bad condition. It was foul smelling, the gills were foul, the skin showed dry and cracking, the eyes were badly dissipated. It usually turned out considerably better in the can than the fish looked on the cannery floor, because they removed the gills and entrails and other foul smelling parts of the fish; that it didn't can up as badly. The fish that got into a very advanced stage of decomposition before canning produced what witness now calls "putrid," because the fish were so obviously rotten that there would be no mistaking that, when handled

(Testimony of Dr. Albert C. Hunter.)

and put in the cans. Witness states that from his examination of the salmon in question, the putrid and tainted condition of the fish indicated that the fish was decomposed and putrid at the time it was canned.

On cross-examination witness testified as follows: That he examined one 48 can and one 192 can parcel, both parcels being examined on June 17, 1922; that the 192 can parcel, which is number 14049-T, was examined prior to the examination of the 48 can parcel, number 10533-T. In the examination of the 48 can parcel it was divided up into four [49] groups of twelve cans each and the twelve pans set out on the table. Witness has no record of the examination of each dozen either with reference to the 48 can parcel or the 192 can parcel. Witness kept only the total record for each parcel. From the 48 can percel witness found eight tainted cans and nine which he designated as "off" or stale, did not classify any as putrid. With reference to the 192 can parcel witness found six putrid cans, 33 tainted cans, and 38 cans which were "off" or stale, making a total of 39 cans putrid, tainted or stale, or a percentage of 20.3. In the stale cans the decomposition has not progressed to the extent that it is known as a tainted can. If fish is stale it will become tainted if left long enough, that is, before it is canned. After it is canned its condition does not change. When it is once canned its condition is fixed if it is properly processed. In witness' judgment none of the decomposition or staleness found in the salmon in question was the result of improper

(Testimony of Dr. Albert C. Hunter.)

processing. Processing means the cooking of the fish. Bacteria will develop under certain warm conditions. If salmon were shipped through the tropics one would be very apt to find tainted salmon which would develop in the can itself although the fish were not tainted when canned, provided there are living bacteria in the can and the can had not been properly processed. Witness states that the salmon in question could not have developed the taint found through any changes in atmospheric conditions or temperature because in such a case the cans would swell. Where a tainted condition is produced after canning through changes in temperature the can swells. Witness has carried on no definite experiments to determine that question with regard [50] to different temperatures. The experiments that witness made and which were referred to by him in his direct examination were carried on in 1919 on Puget Sound. Some of the fish were canned at Bellingham, some in Anacortes. In 1920 the work was done on the Columbia River at Astoria. In 1921 the experimental work was done in Seattle. The work in Seattle and Astoria was done personally by witness, and in 1919 the work was done under his supervision. From his experiments witness found that under ordinary conditions without ice on the cannery floor the longest that salmon could be kept out of water in good condition so that it would be safe to can it for human food was 48 hours. That between 48 and 72 hours the condition becomes objectionable. In his experiments with fish 72 hours old the condition varied. There would be some good ones and

(Testimony of Dr. Albert C. Hunter.)

some stale ones. Numerous factors enter into the result. Fish kept out of water three days if kept in a cool place might pass examination.

Thereupon, the following proceedings were had:

Q. (Mr. McCORD.) Now, you can tell the difference between tainted and stale fish.

A. Yes, sir. Sometimes it is difficult to figure a border-line can.

Q. There is a border line between tainted and stale?

A. In this particular lot there was. Those that we left were average quality. There was no mistaking the bad ones.

Q. So far as your observation goes you would say that 20 per cent of this is tainted or putrid salmon?

A. Yes, sir.

Q. In two thousand cases?

A. I believe I heard that from the record. [51]

Q. 20 per cent,—that would be 400 cases.

Mr. FALKNOR.—That would be a matter of computation.

Q. (Mr. McCORD.) Then the 1600 cases that were left were marketable salmon and fit for human consumption, in your judgment?

A. Yes, sir.

Q. How long have you been in the Bureau of Chemistry at Washington, D. C.?

A. Since April, 1918; a little over four years.

Q. Prior to that time where were you?

A. I came directly from college where I was doing graduate work and was employed by an oyster company in Providence, Rhode Island.

(Testimony of Dr. Albert C. Hunter.)

Q. You began your experimentation in the spring of 1919.

A. The preliminary work was in the winter of 1918 and the field work began in 1919, yes, sir.

Q. You examined a very large quantity of the salmon taken back from the packers, known as Army salmon?

A. I examined considerable of it.

Q. Your practice was to do this, wasn't it, Dr. Hunter: You would take one sample that might run 25 per cent bad salmon and you would draw another sample and that might run 15 per cent and you would draw another one,—an equal number of cans,—and it would run 5 per cent, and you would draw one that would be practically perfect, and you always averaged those up to determine, did you not, the quantity?

A. No, I never did. If you understand my position,—I was not an administrative officer. I had nothing to do with drawing the samples. If samples were submitted [52] to me with orders to make an examination, I examined the salmon and reported to the Chief of the Bureau my findings. That was my part in the affair.

Q. You don't know what he did?

A. No, sir.

Q. That is, you don't know definitely in each case?

A. No, sir.

Q. As a matter of fact, you know that you examined parcel after parcel to the extent of five parcels drawn from the same pack?

A. Yes, sir.

(Testimony of Dr. Albert C. Hunter.)

The witness stated further that he did not honestly know what the actual course of the Bureau was with regard to the averaging of the parcels and he further stated:

A. I honestly don't know. At the time I presented my figures I have heard that the Chief of the Bureau did those things. It is simply hearsay. I have no personal recollection of it.

Thereupon, the following proceedings were had:

Q. (Mr. McCORD.) Doctor, are you familiar with the handling of— I mean are you familiar with the custom and regulations under which tomato products are handled through the Bureau of Chemistry in interstate commerce?

A. No, sir.

Mr. FALKNOR.—I object to that as immaterial and not proper cross-examination and move that his answer be stricken.

The COURT.—Objection sustained. The jury is instructed to disregard the answer. [53]

Q. (Mr. McCORD.) Do you know the Howard method for the examination of tomato products, that prevails in the Department of Chemistry?

Mr. FALKNOR.—Same objection.

Mr. McCORD.—I am trying to show, if your Honor please, that they allow canned goods to go into the trade with ten per cent of decomposed and putrid.

The COURT.—Didn't you show that before lunch? Didn't you get an answer to that?

Mr. McCORD.—From this witness? No sir.

The COURT.—Objection overruled.

(Testimony of Dr. Albert C. Hunter.)

Mr. FALKNOR.—Exception, if your Honor please.

The COURT.—Allowed.

Q. (Mr. McCORD.) You are familiar with the Howard method for examination of tomato products, are you not?

A. No, sir. I know they use the method.

Q. You know what it is?

A. I know there is a method, yes?

Q. Do you know what it is?

A. I have never even read the instructions.

Q. It is published by your department, isn't it?

A. Yes, sir. I never have read the publication.

Q. You know what it is?

A. In a general way, yes.

Q. Just what Mr. Hansen said this morning?

A. A microscopic method, yes.

Q. A microscopic method is used, and that is for the testing of the mold or decomposed parts that went into the product, isn't it?

A. I have heard testimony to that effect, yes sir. [54]

Q. The effect of it is that about ten per cent of the product is decomposed, necessarily, under that standard established by the Department, isn't it?

A. I don't know.

Mr. FALKNOR.—He has already testified he doesn't know anything about this method.

The COURT.—Well, you may make the statement. Objection overruled.

A. I know nothing about that at all.

(Testimony of Dr. Albert C. Hunter.)

Q. (Mr. McCORD.) You don't know anything about that at all? A. No.

Q. You never examined any tomatoes?

A. I never looked at canned tomatoes in my life, no sir.

Q. You did examine tomato catsup, didn't you?

A. For sterility, for bacterial growth. Never for molds.

The salmon in question was not tested for bacteria. Witness is certain without any such examination that the condition of the salmon at this time is due to the condition of the salmon at the time it was packed. The first few cans of salmon that witness examined in his experience he did examine for sterility and after he had had considerable experience in examining salmon both organoleptically, that is, by sense of smell, and sterility, he found that it was simply a waste of time to test for sterility. The small per cent of non-sterile cans witness found was negligible, and the bacteria that were present were such that it caused no spoilage in the product, and he stopped it. After the canning of the salmon there is no further spoilage unless the can swells. If the spores were left there and the can is not completely full it might cause a swell. Witness has no experimental experience to determine [55] whether the can would necessarily swell or not. He does not know whether the bacteria would grow in the can or not at all under any temperature. Referring to the cans that witness examined he is absolutely certain that it was rotten fish that

(Testimony of Dr. Albert C. Hunter.)

was put into the can. He bases his opinion on the experimental work he has done where he has produced these cans that they have never been able to duplicate in any other way and when salmon spoil subsequently to canning, it smells and looks differently. If bacteria remained in the fish after it was canned it would decompose and witness would be able to detect it. Witness has seen salmon which has spoiled in the cans but the cans in such cases swell. Witness has never tried to spoil salmon in a can and has never performed any experiments where the salmon spoiled in the can without the can swelling. Witness has seen people who could not detect a tainted can by sense of smell. Witness has seen people say that they didn't think cans of salmon were bad when witness thought they were putrid, although witness does not know the condition of their smelling apparatus. There is no division of belief as to classification of putrid cans, there is no mistake about them.

The witness stated that if the salmon were not properly cooked and the bacteria destroyed that spoilage might result, that might cause the can to swell, but not necessarily if the can was not entirely full of salmon or oil.

The witness further stated that anyone whose smelling organs were in good condition could easily detect the putrid cans but was not certain as to cans on the border line. [56]

Testimony of D. B. Dill, for Libelant.

D. B. DILL, after being duly sworn, testified as follows on behalf of the libellant:

Witness is a chemist employed by the Bureau of Chemistry, United States Department of Agriculture, and has been with that Bureau about four years. He is a graduate chemist, having done his undergraduate work at Occidental College at Los Angeles, graduated there in 1913 with the degree of Bachelor of Science. The following year he spent at Stanford University and graduated from there in 1914 with a degree of Master of Arts. He was head of the chemistry department at a technical high school in Salt Lake City for two years following his graduation from Stanford and the year following [57] he was principal of the Eldorado County high school in California. The year following that he was head of the chemistry department in the Palo Alto high school, California, and at the close of that year, in 1918, he entered the employ of the Bureau of Chemistry and is now stationed at Seattle. Has had experience in testing canned salmon organoleptically, that is, by a physical test rather than a chemical test. That he was present on June 17, 1922, when the 48 can lot No. 10533-T and the 192 can lot No. 14049-T were examined. Referring to the 48 can parcel witness found one of the cans to be putrid and seven cans to be tainted and two additional to be stale, making a percentage of putrid and tainted cans of 16.6 per cent. Referring to the 192 can lot No.

(Testimony of D. B. Dill.)

14049-T, he found twelve of these cans to be putrid, 24 cans tainted and ten cans stale, making a percentage of putrid and tainted cans of 18.7 per cent. In the aggregate he examined 240 cans, of which he found 44 cans to be putrid or tainted, making in the aggregate a percentage of putrid or tainted cans of 18.3 per cent. In addition he found in the aggregate twelve stale cans, or an additional percentage of five per cent.

Testimony of C. W. Johnson, for Libelant.

C. W. JOHNSON, after being duly sworn, testified as a witness on behalf of the libelant as follows:

Witness is one of the professors of chemistry at the University of Washington and has been dean of the College of Pharmacy at that institution for 19 years. Witness is a graduate chemist from the University of Michigan and since his graduation has been constantly connected with his profession. [58] He was present on June 17, 1922, when the 48-can parcel and the 192-can parcel were examined. Of the 48-can lot witness found two putrid, seven tainted and six stale cans, making a total percentage of putrid and tainted cans of 18.6 per cent. Referring to the 192-can lot witness found 15 putrid, 19 tainted and 13 stale cans, making a percentage of tainted and putrid cans of 17.6 per cent. In the aggregate witness examined 240 cans, his examination disclosing 17.9 per cent putrid or tainted and in addition thereto 7.9 per cent stale.

(Testimony of C. W. Johnson.)

On cross-examination witness testified as follows: In the examination of the two parcels the cans were divided into lots of one dozen each. At the time of his examination witness kept the record of examination of each dozen lot but has since destroyed that record. Referring to the condition of the taint in the 48 cans, it was a decidedly unpleasant odor. It was decidedly tainted. Witness stated that he did not believe it was very difficult to tell whether a can was tainted or whether it was simply stale or off-smelling. In the examination of the dozens he found one set of twelve where there were no tainted or putrid cans. The balance witness would not say was an average merchantable pack, nor would he say it was a fair quality of salmon. The 192-can parcel ran about the same way as the 48-can lot. Witness was present during the entire examination of these two parcels. The percentage of putrid salmon of the 48-can lot was 4.1 per cent, and the percentage of putrid in the 192-can lot was 7.8 per cent. In the tainted cans the degree of rottenness was not as bad as in the putrid cans. Witness has been examining food products [59] for a good many years, being connected with the Food Department of the State of Washington. If tainted or putrid stale fish is being packed, it is witness' understanding that it is the effort of the state to prevent it and keep it off the market. There possibly is a very slight decomposition in every can of meat or fish product. Under proper conditions the decomposition increases the longer the animal remains dead. Witness

(Testimony of C. W. Johnson.)

presumes there is no such thing as absolute purity. If he or his department considers a parcel of food as bad an attempt is made to condemn it and keep it from the trade. The state has condemned hundreds of thousands of cases of canned salmon. Witness does not know as to whether or not one eating the salmon would suffer from it. As soon as the fish is dead decomposition sets in necessarily.

Thereupon the following proceedings were had:

Q. (Mr. McCORD.) Well, that is your general information, is it not, that it is not injurious to human health?

Mr. FALKNOR.—He said he didn't know, and his opinion is not material here.

Mr. McCORD.—That is all he can give.

Mr. FALKNOR.—It is not competent. He is not an expert on the effect it has on a human being, he does not claim to be a physician.

(Objection overruled.)

Mr. FALKNOR.—Exception.

A. Well, it is my opinion that any decomposed food is potentially a dangerous product.

Q. Yet, in your experience you never knew of any case that resulted in an injury to human health from eating it?

A. I have known of many cases of food poisoning. [60]

Q. I mean salmon?

A. As a rule not traceable.

Q. I mean of salmon?

(Testimony of C. W. Johnson.)

A. No, I haven't any definite case of salmon.

Q. And how long did you say you had been in the Chemical Department of the State of Washington at the University?

A. At the University nineteen years.

Q. And in all the nineteen years, you have never known of a specific case of an injury to health from eating tainted salmon?

A. I have no definite knowledge of that; no, sir. [61]

Testimony of R. Wilfred Balcom, for Libelant.

R. WILFRED BALCOM, after being duly sworn, testified as a witness on behalf of libellant as follows:

That he is a chemist connected with the Bureau of Chemistry and has been employed by the Government about fifteen years, being a graduate of the Massachusetts Institute of Technology. (Thereupon claimant conceded the qualifications of this witness.) That on June 17th, 1922, witness, in company with the other experts mentioned, examined the 48- and also the 192-can samples furnished, numbered respectively 10533-T and 14049-T. That these were examined by witness by a physical examination with reference to their degree of decomposition. In the 48-can sample witness found a total of 2 putrid and 7 tainted cans, making a percentage of putrid and tainted cans of 18.75 per cent. Besides these cans witness found 7 additional cans classified by him as off or stale cans, or a percentage of between 14 and 15 per cent of off or stale cans. Referring to the 192-

(Testimony of R. Wilfred Balcom.)

can sample, No. 14049-T, witness found from these cans a total of 39 that were either putrid or tainted, or 23.3 per cent. In addition, he found 29 cans, or approximately 15 per cent, which were off or stale cans. By a putrid can witness means one that stinks, simply an excessive degree of decomposition and one that is very rotten. By a tainted can he means one that has a perceptible odor, distinctly perceptible odor, objectionable odor of tainted or rotten flesh, being not quite so strong an odor as in a putrid can; that a putrid can is one that smells worse than a tainted can.

Witness stated that he participated in the experiments conducted by Dr. Hunter and Mr. Hansen to the extent [62] that this experimental work was originally planned by witness and the other laboratory co-operating, of which Dr. Hunter was a member. The chemical work for a time was done under witness' direct supervision. That this work was done on Puget Sound for the most part and the chemical work was done on the Sound as far as it was possible to do same in the field, the rest of the chemical work being done in Washington. Practically, the results of this experimental work were as follows: That there is a close parallel between the condition of the raw fish, as shown by a physical examination, that is, by odor, and to some extent appearance, and by chemical examinations, and the condition of the canned product when the can is opened. That fish that is in good condition when put in the can will be found in good condition when the can is opened.

(Testimony of R. Wilfred Balcom.)

That fish should not be held much longer, that is under ordinary conditions, than 48 hours after it is taken out of the water before it is packed at the cannery. Witness is convinced of the fact, from the results of these experiments, that the salmon he found in the putrid and tainted cans was putrid and tainted salmon when it was packed.

On cross-examination, witness testified as follows: That if it was bad when it was put in the can it remained bad; if it was good when it was put in the can but not properly cooked or processed something might happen. Spoilage might be due to improper processing and the leaving of spores of bacteria in the can. Witness stated that in his previous testimony he assumed that the processing was complete, as ordinarily carried out. That tainted salmon has a perceptible odor. That putrid salmon contains more rottenness. That witness thinks that anybody ought to be able to detect a putrid can but doesn't be- [63] lieve anyone could detect a tainted can though their smelling apparatus was all right.

Thereupon the following proceedings were had:

Q. Didn't you so testify in the trial of the United States against 80 cases of salmon and United States against 1379 cases of salmon, in this court, some time ago? I will just ask you if you didn't testify that anyone could tell it?

Mr. FALKNOR.—I will ask that counsel read the question.

(Testimony of R. Wilfred Balcom.)

Q. (Mr. McCORD.) Did the Court ask you this question: "Let me ask a question: In this tainted or putrid classification, I understand that putrid is where the decomposition has progressed to such an extent that to an experienced person you determine it from the odor"? Your answer was: "Yes, and usually an ordinary person without experience can easily detect it as well." "The COURT.—And the stale or off salmon, how do you arrive at that? The WITNESS. —In the examination of these various parcels of salmon we find a certain number of cans which we class as tainted or putrid and also a certain other number in which the odor is not so strong. The COURT.— But they are passed on by the smell? The WITNESS.—By the smell, yes. If we don't get a definite odor of taint in those cans—some of those cans might be what I call a doubtful taint and I am not sure. To give them the benefit of the doubt, I put them in the off column," and so on. Didn't you so testify in answer to questions propounded to you by the Court— "Yes, and usually an ordinary person without experience can easily detect it as well". [64]

Mr. FALKNOR.—The question shows that it referred to putrid cans—the questions and answers which have been read. I object to the form of the question.

The COURT.—Overruled.

Q. (Mr. McCORD.) Didn't you so testify, doctor?

A. I don't recall. I presume, if it is in the record there, of course.

(Testimony of R. Wilfred Balcom.)

Q. That is a fact, isn't it, that anybody whose smelling apparatus is in good condition, a man of ordinary smell, could detect putrid cans, without any question?

A. I don't think there is any question about that; no, sir.

Q. Now, if the tainted cans are—if it is perceptible, that is, if it is not on the dividing line between the stale and slightly tainted, any person with ordinary experience could do that, couldn't they?

A. I think one could say that if he smells it at all, that ordinarily he would be able to detect the taint, provided there is something—there is nothing the matter with his sense of smell.

The witness testified that he had been for fourteen years connected with the Bureau of Chemistry and that he was unable to specify any particular instance of illness, sickness or death resulting from the eating of adulterated salmon like those examined by the witness in this question.

Thereupon the following proceedings were had:

Q. Now, Doctor, in the conduct of your business in the Bureau of Chemistry, you don't and can't undertake to literally [65] say that nothing shall go, in the way of food product, into interstate commerce, unless it is entirely free from decomposed matter, can you?

A. I don't believe that would be an administrative possibility.

Q. It would be a practical impossibility?

(Testimony of R. Wilfred Balcom.)

A. Yes.

Q. —to literally construe that law, wouldn't it?

A. I think so; yes, sir.

Q. Therefore, the Bureau of Chemistry, in recognition of the fact have made, without possibly fixing any definite standard—they have allowed and daily allow food products to go into interstate commerce that are more or less tainted or bad or defective cans, is that so?

A. They have to make some rules for administrative guidance, and of course realizing that it is useless to make or adopt rules for their guidance that cannot be upheld as a practical matter, and, necessarily, they have to adopt some rules of that kind.

Q. And a literal enforcement or attempted enforcement of the regulation preventing any food products with decomposed matter in them to go into commerce would practically destroy commerce, wouldn't it?

Mr. FALKNOR.—I think that is a matter of argument, and I object to it.

The COURT.—Well, it is partly fact and partly argument.

Objection overruled.

Q. (Mr. McCORD.) Isn't it, doctor?

A. I don't know. I am not competent to answer that, as to whether it would destroy commerce or not.

Q. Well, nevertheless, in view of human infirmities and the [66] infirmities attending the packing of food products, the Bureau of Chemistry has been com-

(Testimony of R. Wilfred Balcom.)

pelled to recognize that they must grant some leeway, haven't they?

A. Yes, and they have to take those things into consideration, necessarily; we all have to do that.

Q. In order to practically carry on the business?

A. Yes, sir.

Thereupon, the following proceedings were had:

Q. (Mr. McCORD.) Doctor, under one of the regulations of your department you forbid the passing into interstate commerce of any food product that has any deleterious or substance injurious to health, isn't that one of your regulations?

A. I think that is covered by the Food and Drugs Act, is it not?

Q. By your regulations, yes.

A. I presume we have regulations bearing on it, yes sir, that is, one provision of the Act where you have poison substances.

Q. Now, I will ask if your regulations haven't been so that as to canned tomatoes, rice, corn, salmon and things of that kind, you recognize that it is not injurious to human health and therefore you allow a certain percentage of bad cans to go into interstate commerce because it is not likely to hurt anybody?

A. No, sir; I don't think we allow them to go into interstate commerce because it is not likely to hurt anybody.

Q. You would not let them go if it would hurt them, would you

A. We would try our best to prevent it, yes, sir. [67]

(Testimony of R. Wilfred Balcom.)

Q. That is an answer to my question. Now, Doctor, why is it that your department has seemed to adopt an arbitrary standard of ten per cent in the past in the case of salmon——

Mr. FALKNOR.—Objected to as he has already testified that they didn't adopt any such standard.

The COURT.—I am not clear whether he has or not.

Objection overruled.

A. If you will permit me, I think I can make that point clear. When we first began the examination of this canned salmon in large quantities, there was such a large percentage of it on the market that was in very bad condition that merely as an administrative policy we had to adopt some rule as to where we should bring an action and where we should let the matter go——

Q. Yes.

A. —and for a time there was a certain limit, somewhere around ten per cent. That was several years ago; and the reasons for that—for the percentage being so high at that time, were various. I will mention perhaps two. One was that we didn't know so much about the business then as we do now, but the principal one was that there was such large quantities of salmon on the market that were so much worse than ten per cent, that we considered that the best we could do with our limited funds and personnel was to get those parcels off the market that were worse than ten per cent. If we succeeded in doing that at that time, we were doing mighty well. [68]

(Testimony of R. Wilfred Balcom.)

That the department never recognized the fact nor has ever admitted the fact or believed that this putrid or tainted salmon would not hurt anyone. They believed that it probably would not kill anyone, but that it might cause them digestive disturbances and all that.

Thereupon the following proceedings were had:

Q. Have you ever known of a case of injury to health, either seriously or temporarily, from the eating of tainted salmon?

A. No, sir; not of salmon.

Q. That is what I say, of salmon. Now, then, having no knowledge of any ill results following the eating of tainted salmon, then I will ask you upon what theory you can say that it is safe and proper to allow ten per cent of possibly bad salmon to go into interstate commerce and at the same time fifteen per cent ought not to be allowed to go?

Mr. FALKNOR.—I object to that as immaterial and not proper cross-examination.

The COURT.—Overruled if he has anything to add to what he has already said. He has spoken of it as an administrative measure. If there is anything more, you may state.

A. I do not hold that it is either safe or proper, and I don't believe the Bureau of Chemistry or the Department of Agriculture so holds, but at that time it was the best we could do—was to keep off the market the worst samples. At the present time we [69] are working on an entirely different basis.

Q. If I understand you correctly, then, you say that

(Testimony of R. Wilfred Balcom.)

the regulations of your department in a measure depend upon the exigencies and conditions?

A. They have to be, yes sir, to some extent.

Q. And in 1919 it was all right to ship this quality of salmon into the market, when it was ten per cent?

A. We didn't say it was all right.

Q. I say you permitted it to be done?

A. We held it was all wrong, but——

Q. Now you would not have the same rule?

A. No, sir; we don't.

Q. In other words, a parcel of salmon today you would not pass as you would have in 1919?

A. We would not be so lenient with, no sir.

Witness cannot say when the salmon in question was packed. Witness knows there is a method known as the Howard method for the examination of tomato products; that the method has been published in the department journal, and witness knows it is a microscopic method of examination but does not know the details of the method and has never used it. Doesn't know anything about it. Witness doesn't believe that he ever examined any canned tomatoes; doesn't recall that he ever did and certainly never used that method. That the salmon in question was not examined bacterially and no attempt was made to make such an examination.

Out of the 48-can lot, witness found 2 putrid cans, or a little over 4% of putrid cans. Out of the 192-can parcel he found 3 putrid cans and 36 tainted, making a total of 39 tainted or putrid, or about 1½% of putrid cans in the 192-can lot, with [70] an addi-

(Testimony of R. Wilfred Balcom.)

tional total of 19% tainted cans. These tainted cans represent varying degrees of taint, graduated from slight tainted to strongly tainted. By a slightly tainted can witness means one where the tainted odor of putrescent meat or fish is distinctly perceptible, and a tainted can is one where the odor is still more perceptible. The classification then graduates down to those cans recorded in the off column, some of which witness was [71] in doubt as to whether there was a tainted odor, with some of which he recorded as doubtful taints. Then going down still further would be the stale cans. Witness considered a doubtful taint a little worse than a stale, and these would be cans that he would mark or which he would call strong; the odor is not entirely that of fresh salmon.

On redirect examination, witness testified as follows: After the rush of work involved in the examination of the large quantity of salmon on the market several years ago was out of the way, the department began as its administrative policy to tighten up a little bit, and the basis now if they have any is about this, that they probably would not start an action in the court of any kind on a sample of salmon or parcel of salmon that showed less than around 5% of putrid and tainted cans. If it showed more than that they would probably begin action, but of course they realize in all matters that the ultimate standard, the tolerance, if it might be called that, is fixed by the court action and not by the department. The only reason that the percentage was ever fixed as

(Testimony of R. Wilfred Balcom.)

high as ten per cent was due entirely to the exigencies of the situation, that to condemn and destroy salmon that was 20% bad would have no effect whatever on the legitimate trade.

On recross-examination the witness testified as follows: That the regulations of the department in a measure have to depend upon the exigencies of the situation and the present conditions. That the department never said it was all right to ship salmon into the market which was less than 10% bad. That the department would not be lenient with the salmon now as it was in 1919. [72]

Thereupon the government offered in evidence and there was admitted in evidence Government's Exhibit No. 1 for identification, which was and is a chart recapitulating the testimony of the various Government witnesses with reference to the analysis of the salmon in question, which said chart was and is in words and figures as follows, to wit:

Government's Exhibit No. 1.

F. and D. No. 14262.

	Putrid or Tainted.	Stale.
A. W. Hansen, 384 cans from 384 cases	71 cans or 18.4%	31 cans or 8.0%
C. W. Johnson, 240 cans from 240 cases	43 cans or 17.9%	19 cans or 7.9%

D. B. Dill, 240 cans from 240 cases	44 cans or 18.3% Off	12 cans or 5.0% Including Stale
A. C. Hunter, 240 cans from 240 cases	47 cans or 19.5%	47 cans or 19.5%
R. W. Balcom, 240 cans from 240 cases	48 cans or 20.0%	36 cans or 15.0%

Average of all Analysts:—

Tainted or Putrid	18.8%
Stale or off	10.7%

[73]

Thereupon the following proceedings were had:

Mr. FALKNOR.—And, for the sake of the record, I understand also that counsel will concede that the salmon seized under the process of the Court was in the same condition as it was when it left Alaska.

Mr. McCORD.—Yes.

Thereupon further proceedings were had, as follows:

Mr. McCORD.—Your Honor, I would like to make a motion in this case, if you will excuse the jury a little while.

The COURT.—The jury may retire. (Jury retired.)

Mr. McCORD.—At this time, your Honor, we desire to move for a nonsuit and dismissal of this action, for the reason that there is no evidence that will justify the Court in permitting the matter to go to

the jury; there is no evidence that would justify the entry of a judgment of forfeiture in this case.

(Arguments by respective counsel.)

The COURT.—I think, in the practice in this court, that a motion of this kind or a motion to take the case from the jury as a matter of law, has customarily been a motion for an instructed verdict. A motion for nonsuit I think is state practice, and under the conformity statute it is a proper motion, I take it.

Mr. McCORD.—We are perfectly willing that it be amended to be for an instructed verdict, your Honor.

The COURT.—Well, then you announce at this time that you have no evidence to introduce on behalf of the de- [74] fendant and change your motion to a motion for an instructed verdict?

Mr. McCORD.—Yes.

The COURT.—The record may so show.

There is little that occurs to me to add to what is said in the opinion of this Court in the other case. As to the meaning of the statutory words, I find nothing in this case or in the argument to change my view expressed therein.

I am convinced that under the showing made here there would be nothing to warrant the Court in inferring or acting on the assumption that there was anything in doubt regarding the fairness of the samples taken, about which testimony has been given in this case, but, even so, I see no application either of the candy case or the syrup case or the oyster case to this. In the matter of the candy and in the matter

of the syrup and in the matter of the oysters, there was a reasonable presumption of a fact or something in the nature of an issue of fact to submit to the jury. The jury might reasonably conclude that the oysters' feeding ground, where the oysters had been gathered, being, as I understand that case, the same feeding ground, that each oyster fed on substantially the same product, and in the samples of the oysters taken each of them showed some varying amount of impurity—the jury would certainly be justified in concluding that all the other oysters, not sampled and not tested, would likewise contain a certain amount of impurity and render them unfit for [75] food under this law. So in the case of the syrup, where it was labelled "Maple" syrup, the cupidity of the manufacturer having induced him to label as maple syrup certain portions of a shipment that were not in fact maple syrup, the jury would be warranted in applying what they knew about human nature—the doctrine of if false in one, false in all; that if the seller of the maple syrup was cheating and deceiving the public in the cans that were sampled, they would be justified in concluding that in the other cans so labelled but not sampled he was likewise cheating and defrauding the public by the misbranding of those. I am not entirely clear about the candy case, but I take it that that comes under the same rule.

Under the Government's own theory, the salmon were rotten before they were put in the cans. The individual fish being caught and transported to the cannery and held awaiting canning in the cannery, are

subjected to different conditions, one fish is kept out of water longer than another before it is canned.

I am convinced that the rule that obtains, that is adopted by the Department, has grown out of the inconvenience and impractical nature of the problem of sampling each can. The expense of cutting open the cans and recanning the pure fish is so out of all proportion to the value of the product after it is canned, that it becomes impracticable to do so. You cannot test all the cans without destroying all the product tested, and, therefore, they have adopted this rule, but it does not [76] change the meaning of the language in the statute.

I still adhere to the view that the "article" of the statute is the single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent or twenty per cent of them were tubercular. There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard.

I am impressed with the proposition that the housewife or cook would be able to protect the consumer against impurities of the nature described in the testimony here. The reason I am convinced of that is that there does not appear to be any substantial or any striking difference between the percentages given by

those men who are experienced in examining salmon, who do not resort to chemical tests, and those witnesses who have resorted to chemical tests. The men who are used to examine salmon simply relying on their eyes and their noses, have discarded and found impure practically the same percentage of salmon that those chemically testing it have done; I am not sure but what they have rejected on an average more than those who have chemically tested the salmon.

I do not say that the Department, after investigation, where the product was in bulk, where you could [77] treat the bulk as the article, might not reasonably adopt a standard, because there are more or less impurities in all food—it is a common expression that "Every one has to eat his peck of dirt sometime"—and they would be justified in resorting to percentages, but I do not conceive that if you take a number of articles of which you may find ten per cent or twenty per cent of the articles impure, that they are justified in condemning or asking the court to condemn the remaining articles that are not impure.

The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding, in the absence of positive language leaving no room for doubt, that it was the intent to destroy sixteen hundred cases of good salmon out of a total of two thousand cases. So the motion for a directed verdict will be granted. The clerk will prepare the form and the bailiff call the jury in.

Mr. FALKNOR.—I would like to have an exception noted.

The COURT.—Exception allowed.

The jury here returned into the courtroom, whereupon the following proceedings were had:

The COURT.—Let the record show the jury are all present.

Gentlemen, the Court has decided this case, as a matter of law, and the verdict as prepared under the direction of the Court reads as follows: "We, the jury [78] in the above-entitled cause, find the respondent 1974 cases canned salmon labelled in part 'Hypatia Brand Pink Salmon' not guilty as charged in the libel of information filed herein, being instructed by the Court so to do." The bailiff will hand the verdict to the jury, and if one of your number will sign it as foreman, I will then receive the verdict. Mr. Potts may sign the verdict.

This law directs that an article in whole or in part decomposed, putrid or—I have not the language before me, but the Court ruled that that does not apply; that it applies to bulk articles where there is a certain percentage of the entire mass that is putrid, but it does not apply to where a percentage of separate articles, such as cans of salmon, are part of them impure; that it does not give the Court any authority to destroy the good cans of salmon. Where an article in bulk, like liquid or a mass, is wholly impure, or partly impure, you can treat the whole of it as one thing, but you are not warranted, in law, in treating separate cans of salmon as one thing.

So gentlemen, listen to your verdict as it has been prepared under the direction of the Court: "We, the jury in the above-entitled cause, find the respondent 1974 cases canned salmon labelled in part 'Hypatia Brand Pink Salmon' not guilty as charged in the libel of information filed herein, being instructed by the Court so to do. W. G. Potts, Foreman". Gentlemen, do you say one and all this is your verdict? It will be received as [79] your verdict and filed in the case.

You are discharged from further consideration of the case and excused until to-morrow at two o'clock. [80]

United States of America,
Western District of Washington,
Northern Division,—ss.

I, Edward E. Cushman, the Judge of the District Court of the United States for the Western District of Washington, Northern Division, before whom the above-entitled cause was tried, DO HEREBY CERTIFY that the matters and proceedings set forth in the foregoing bill of exceptions are matters and proceedings which occurred on the trial of said cause, and the same hereby are made part of the record herein; counsel for the respective parties hereto being present and concurring herein.

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of July, 1922, at Seattle, in said District.

EDWARD E. CUSHMAN,
Judge.

O. K.—KERR, McCORD & IVEY,
Attorneys for Claimant.

Received a copy of the within proposed bill of exceptions, this 7th day of July, 1922.

KERR, McCORD & IVEY,
Attorneys for Respondent and Claimant.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division, July 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [81]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libelant,

vs.

1974 CASES OF SALMON, etc.,
Respondent.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Kindly prepare, certify and transmit to the Clerk of the Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, a typewritten transcript of the record on appeal in the above-entitled cause, containing the following portions of the record in the above-entitled cause, to wit:

1. Libel of information.
2. Praecipe for monition and attachment.
3. Monition and attachment and Marshal's return thereon.
4. Claim of A. O. Anderson & Co.
5. Answer of claimant A. O. Anderson & Co.
6. Demand for jury.
7. Verdict.
8. Decree.
9. Order extending time to file bill of exceptions.
10. Order extending time to file record in Circuit Court of Appeals.
11. Petition for writ of error.
12. Assignment of errors. [82]
13. Order allowing writ of error.
14. Admission of service.
15. Bill of exceptions.
16. This praecipe.

Dated at Seattle this 19th day of July, 1922.

THOS. P. REVELLE,
United States Attorney.
JUDSON F. FALKNOR,
Assistant United States Attorney.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing, as provided under rule 105 of this Court.

THOS. P. REVELLE,
United States Attorney.
JUDSON F. FALKNOR,
Assistant United States Attorney.

We hereby acknowledge service of a copy of the foregoing praecipe, waive the right to request the insertion of any other matters than those incorporated in the foregoing praecipe, and stipulate that the proceedings, papers, orders and documents included in said praecipe constitute a full and sufficient record upon writ of error.

Dated July 19, 1922.

KERR, McCORD & IVEY,
Attorneys for Claimant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [83]

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,
Libellant,

vs.

1974 CASES CANNED SALMON Labelled in Part "Hypatia" Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery.
A. O. ANDERSON COMPANY,
Claimant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington, ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 83, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit. [84]

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 183 folios at 15¢ $27.45

Certificate of Clerk to transcript of record, 4 folios at 15¢ ..... .60
Seal to said certificate..... .20

Total $28.25

I hereby certify that the above cost for preparing and certifying record, amounting to $28.25 will be included in my quarterly account to the Government, of fees and emoluments for the quarter ending September 30, 1922.

I further certify that I hereto attach and herewith transmit the original writ of error, original citation and original acceptance of service of citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 22d day of July, 1922.

[Seal] F. M. HARSHBERGER,

Clerk United States District Court, Western District of Washington. [85]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. ——.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

1974 CASES CANNED SALMON Labeled in Part "Hypatia" Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery,
Respondent in Error.

A. O. ANDERSON COMPANY,
Claimant.

Writ of Error.

The United States of America,—ss.

The President of the United States to the Honorable EDWARD E. CUSHMAN, Judge of the United States District Court for the Western District of Washington, Northern Division, and to said Court, GREETING:

Because in the records and proceedings as also in the rendition of judgment in the above-entitled cause which are in the said district court before you between the United States of America as libelant, and 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery as respondent, and A. O. Anderson Company as claimant, a manifest error hath happened to the great damage of the said libelant, the United States of America, as by its complaint appears,

and we being willing that error, if any hath been, should be corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal you send the records and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for [86] the Ninth Circuit, together with this writ, so that you may have the same in the city of San Francisco, State of California, where said court is sitting, within thirty (30) days from the date hereof in the said Circuit Court of Appeals, to be then and there held, that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 24th day of June, 1922.

[Seal] F. M. HARSHBERGER,

Clerk of the United States District Court for the Western District of Washington, Northern Division.

Allowed this .... day of ...., 1922, after plaintiff in error had filed with the clerk of this court with their petition for a writ of error their assignments of error.

.....,

Judge of the United States District Court for the District and Division Aforesaid.

Copy of the within writ of error received and acknowledged this .... day of ...., 1922.

....,

Attorneys for Claimant. [87]

[Endorsed]: No. .... In the Circuit Court of Appeals of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, vs. 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon," etc., Respondent in Error, A. O. Anderson Company, Claimant. Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [88]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5829.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

1974 CASES CANNED SALMON Labeled in Part "Hypatia" Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery,

Respondent in Error.

A. O. ANDERSON COMPANY,

Claimant.

Citation on Writ of Error.

To 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery, and A. O. Anderson Company, Claimant.

YOU ARE HEREBY cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the city of San Francisco, State of California, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the United States of America is plaintiff in error, and 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery is respondent in error, and A. O. Anderson Company is claimant, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf. [89]

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States of America, this 24th day of June, 1922.

EDWARD E. CUSHMAN,

Judge of the United States District Court for the Western District of Washington.

Copy of the within citation on writ of error received and due service of the same acknowledged on this 26th day of June, 1922.

KERR, McCORD & IVEY,
Attorneys for Claimant. [90]

[Endorsed]: No. .... In the Circuit Court of the United States for the Ninth Circuit. United States of America, Plaintiff in Error, vs. 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon" Shipped by Alaska Herring & Sardine Co. Cannery, Respondent in Error, A. O. Anderson Company, Claimant. Citation on Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [91]

[Endorsed]: No. 3899. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Plaintiff in Error, vs. A. O. Andersen Company, a Corporation, Claimant of 1974 Cases Canned Salmon Labeled in Part "Hypatia Brand Pink Salmon," Shipped by Alaska Herring & Sardine Company Cannery, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 27, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States District Court, Western District of Washington, Northern Division.

No. 5829.

UNITED STATES OF AMERICA,

Libellant,

vs.

1974 CASES OF SALMON, etc.,

Respondent.

Order Extending Time to and Including July 31, 1922, to File Record and Docket Cause.

BE IT REMEBERED that this matter came on duly and regularly before this Court, and it appearing to the Court that good cause has been shown why the time for filing record on appeal with the Circuit Court of Appeals should be extended,

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that the date and time for filing the record on appeal herein with the Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same is hereby extended to and including the 31st day of July, 1922.

Done in open court this 19th day of July, 1922.

EDWARD E. CUSHMAN,
Judge U. S. District Court.

Approved:

KERR, McCORD & IVEY,
Attorneys for Claimant.

[Endorsed]: No. 5829. In the District Court of the United States for the Western District of Washington, Northern Division. United States vs. 1974 cs. Salmon. Order Extending Time for Filing Record in C. C. of A. Filed in the United States District Court, Western District of Washington, Northern Division. July 19, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

No. 3899. United States Circuit Court of Appeals for the Ninth Circuit. Order under Subdivision 1 of Rule 16 Enlarging Time to and including July 31, 1922, to File Record and Docket Cause. Filed July 27, 1922. F. D. Monckton, Clerk.

No. 3899

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

A. O. ANDERSON & COMPANY, Claimant of 1974 CASES OF CANNED SALMON LABELED IN PART "Hypatia Brand Pink Salmon" SHIPPED BY ALASKA HERRING & SARDINE CO. CANNERY,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

THOS. P. REVELLE,
United States Attorney,
JUDSON F. FALKNOR,
Assistant United States Attorney,
Attorneys for Plaintiff in Error.

FRED D. SILLOWAY,
JAMES B. HORIGAN,
Of Counsel.

Address: 310 Federal Building,
Seattle, Washington.

SHERMAN PRINTING AND BINDING CO., SEATTLE, WASH.

No. 3899

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff in Error.

vs.

A. O. ANDERSON & COMPANY, Claimant of 1974 CASES OF CANNED SALMON LABELED IN PART "Hypatia Brand Pink Salmon" SHIPPED BY ALASKA HERRING & SARDINE CO. CANNERY,
Defendant in Error.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF PLAINTIFF IN ERROR

STATEMENT OF THE CASE

This case is before the court on a writ of error to the District Court of the United States for the Western District of Washington, Northern Division, and comprises a proceeding under the Act of June 30, 1906, (Pure Food and Drugs Act),

seeking the condemnation and forfeiture of 1974 cases of canned salmon. The libel of information on behalf of the United States alleged in substance that the 1974 cases of canned salmon in question constituted a shipment from Port Walter, Alaska, to the City of Seattle, in the State of Washington, arriving at Seattle on or about August 7th, 1920, in interstate commerce; that at the time the libel of information was filed the parcel of salmon was in the same condition as it was when it was shipped from Alaska to Seattle and when it arrived in Seattle and was in the original unbroken packages. The libel of information further alleged that the said 1974 cases of canned salmon were adulterated, under the provisions of Section 7 of the Food and Drugs Act, paragraph sixth under "Food," in that they consisted wholly or in part of filthy, decomposed and putrid animal substance. The salmon in question was seized by the Marshal, under the usual process, and thereafter A. O. Anderson & Company filed its claim as the owner of the salmon and its answer denying the allegations of the libel of information as to the adulteration of the salmon but admitting the interstate character of the shipment. At the trial it was further admitted by the claimant that at the

time of the seizure of the salmon by the marshal it was in the original unbroken packages and was in the same condition as it was when it was shipped from Alaska.

Pursuant to Section 10 of the Act in question, the Government demanded a jury to try the issues of fact as framed by these pleadings and the case came on for trial before said District Court and a jury. The evidence introduced on behalf of the Government showed, substantially, as follows:

E. A. McDONALD, an employee of the Bureau of Chemistry, stationed at Seattle, testified that on January 3rd, 1921, he took what is known as "investigational" sample from the parcel of salmon in question, consisting of 24 cans of salmon taken from 24 different cases and selected at random. This investigational sample, as were the further samples taken by him, was turned over to the United States Food and Drug Laboratory at Seattle for analysis and inspection. That on January 5th, 1921, he took an additional sample from the same parcel of salmon, consisting of 192 cans selected from 192 cases. That in taking this second sample of 192 cans he covered the entire pile of salmon, going into it very exhaustively, covering the top, the sides and the lower tier of the pile.

This second sample was given number 10533-T and was delivered to the Laboratory at Seattle for inspection and analysis. That after the seizure of the salmon under the process issued upon the libel for information, he, in company with a representative of the claimant, took what is known as a "post seizure" sample, consisting of an additional 192 cans selected from 192 additional cases. Mr. McDonald testified that at the time of the taking of this last sample he and the claimant's representative agreed as to which cases should be selected, and that both he and the claimant's representative selected from each of the 192 cases selected a can of salmon. These were also turned over to the Food and Drug Laboratory at Seattle for inspection and analysis. This post seizure sample was given number 14049-T. That in the taking of the post seizure sample, as in the next prior sample, he testified that he covered the entire pile, top, bottom and sides. That the total number of cans taken for analysis represented cans taken from 408 different cases of salmon included in the lot.

The chemist who made the analysis of the first 24-can sample was not available, and although the Government offered in evidence the official

records of the Bureau of Chemistry containing the report of this chemist as to the result of his examination, this offer was refused by the Court, so that the testimony adduced at the trial with reference to the analysis of the samples taken was limited to the two 192-can samples.

ARTHUR W. HANSEN testified that he is in charge of the United States Food and Drug Inspection Station at Seattle. That there was delivered to him for analysis sample No. 10533-T, consisting of 192 cans of canned salmon. That at or about the time he received this sample he personally examined 144 cases of the salmon, preserving the remaining 48 for future analysis. That of the 144 cans of this sample examined he found a total of 28 putrid or tainted cans, and in addition thereto 18 stale cans. He, as did the other expert witnesses, testified that by a "putrid" can is meant one whose odor is offensive to the sense of smell and contains rotten, decomposed salmon, and that by a "stale" can is meant one that clearly shows the beginning of decomposition but not so advanced as in a can referred to as putrid or tainted. That from his examination of the 144 cans he found 19.3 per cent thereof contained putrid, rotten or tainted salmon. He, as did other

expert witnesses called by the Government, testified as to practical experiments he had conducted with reference to the canning of decomposed salmon, and upon the basis of these experiments testified that the salmon contained in the cans analyzed and found to be putrid or tainted was in his opinion putrid, decomposed or tainted salmon at the time it was canned. He further testified that the remaining 48 cans of sample No. 10533-T were examined by him some time subsequently, to-wit, on June 17th, 1922, in company with the following named experts who were later called as witnesses by the Government: Mr. Dill, an employee of the Seattle Laboratory, Food and Drug Station; Dr. Johnson, Dean of the College of Pharmacy at the University of Washington, Seattle; Drs. Hunter and Balcom, of the Bureau of Chemistry at Washington, D. C., the two last mentioned witnesses having come from Washington, to assist in the examination of this salmon. That from the 48 cans referred to, Mr. Hansen found 8 to be putrid or tainted and 1 additional to be stale. That he and the other experts named also examined the post seizure sample No. 14049-T, consisting of 192 additional cans. That from his examination of this last 192 cans he found 35

cans to be putrid or tainted and 12 additional cans stale or partly decomposed. Recapitulating, Mr. Hansen stated that altogether he examined a total of 384 cans of this parcel of salmon, of which he found 71 cans to be putrid or tainted, or 18.4 per cent, and in addition 31 cans, or 8 per cent, to be stale, or a total of stale and putrid cans of 26.4 per cent. He further stated that at the time of the examination of the last 240 cans in the presence of the experts named, each of these individuals made an independent examination of each of the 240 cans. Reference is here made to the cross examination of Mr. Hansen, as contained in pages 10, 11 and 12, of the Bill of Exceptions, wherein he testified that the salmon was examined in lots of twelve, and wherein he testified as to his results with reference to each dozen cans of salmon.

DR. ALBERT C. HUNTER, a bacteriologist in the employ of the United States Department of Agriculture, Bureau of Chemistry, testified that in his examination of the 48 cans of sample No. 10533-T, he found 8 of said 48 cans, or 16.7%, to contain putrid or tainted salmon, and in addition thereto, 18.7% of said 48 cans to contain off or stale salmon. He further testified that of

the 192 cans in sample number 14049-T, he found 39 cans, or 20.3% to be putrid or tainted salmon, and in addition thereto 38 cans, or 19.8% stale or off. In the aggregate he examined 240 cans and found 47 which were putrid or tainted, and in addition thereto 47 cans which were stale or off.

D. B. DILL, a chemist employed by the Bureau of Chemistry at Seattle, testified that of the 48 cans examined from sample No. 10533-T, he found 8 cans putrid or tainted and two additional cans to be stale, making a total of putrid and tainted cans of 16.6%. Referring to the 192-can lot, Sample No. 14049-T, he found 36 of these cans to be putrid or tainted, and 10 additional cans stale, making a percentage of putrid and tainted cans of 18.7%. In the aggregate he examined 240 cans, finding 44 cans putrid or tainted, or a percentage of 18.3%.

DR. C. W. JOHNSON, a professor of chemistry at the University of Washington, and who has been dean of the College of Pharmacy at that institution for nineteen years, testified from his examination of the 48-can parcel of Sample No. 10533-T, that he found 9 putrid or tainted cans, or 18.6%, and an additional six cans which were

stale or off. Referring to the 192-can lot, Sample No. 14049-T, he found 34 putrid or tainted cans, or 17.6%, and in addition thereto 13 stale or off cans. In the aggregate, he examined 240 cans, his examination disclosing 17.9% putrid or tainted cans, and in addition thereto 7.9% stale.

DR. R. WILFRED BALCOM, an assistant to the chief of the Bureau of Chemistry at Washington, testified that from his examination of the 48 cans from Sample 10533-T, he found a total of 9 putrid or tainted cans, or 18.75%. In addition thereto he found 7 additional cans which he would classify as off or stale cans, or a percentage of between 14 and 15% stale or off cans. Referring to the 192-can sample No. 14049-T, he found a total of 39 cans either putrid or tainted, or 23.3%. In addition thereto he found 29 cans, or approximately 15%, which were off or stale.

There is copied below, for the convenience of the court, Government's Exhibit No. 1, which is a recapitulation of the testimony of the various experts who examined the salmon in question, showing the similarity of the results obtained by these various experts, and the similarity of the degree of decomposition running through the various samples taken:

Exhibit No. 1

F. and D. No. 14262

	Putrid or Tainted	Stale
A. W. Hansen, 384 cans from 384 cases	71 cans or 18.4%	31 cans or 8.0%
C. W. Johnson, 240 cans from 240 cases	43 cans or 17.9%	19 cans or 7.9%
D. B. Dill, 240 cans from 240 cases	44 cans or 18.3%	12 cans or 5.0%
		Off Including Stale
A. C. Hunter, 240 cans from 240 cases	47 cans or 19.5%	47 cans or 19.5%
R. W. Balcom, 240 cans from 240 cases	48 cans or 20.0%	36 cans or 15.0%

Average of all Analysts:

Tainted or Putrid..... 18.8%

Stale or Off..... 10.7%

Reference is made to the Bill of Exceptions for a more complete statement as to the Government's testimony. The Government's testimony showed beyond all question that the samples were exhaustive and representative, that they were fair

samples, and that the last 192-can sample was taken by agreement with the claimant as being a representative sample of the pile. The testimony of the Government further showed beyond any question that approximately 20% of the salmon in question is rotten, putrid and decomposed salmon, and in addition thereto that the parcel consists of a large per centage of stale or off salmon.

At the close of the Government's testimony it was announced by counsel for the claimant that the claimant had no evidence to introduce in its behalf and thereupon moved the court for an instructed verdict upon the ground that there was no evidence that would justify the court in permitting the matter to go to the jury and because there was no evidence that would justify the entry of a judgment of forfeiture in the cause. This motion was granted by the trial court, a verdict for the claimant was returned as directed by the court, and thereafter a judgment was entered upon the verdict dismissing the proceeding and ordering the marshal to return the salmon to the claimant.

The court, in granting the motion for a directed verdict, held in substance that the word "article" as used in the Pure Food and Drugs Act

meant in this case the individual can of salmon, and that until the Government was prepared to show that each individual can was adulterated within the meaning of the Act it was not entitled to a decree of forfeiture. The court said in part:

"I still adhere to the view that the 'article' of the statute is the single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent or twenty per cent of them were tubercular.

"There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard.

"I am impressed with the proposition that the housewife or cook would be able to protect the consumer against impurities of the nature described in the testimony here. The reason I am convinced of that is that there does not appear to be any substantial or any striking difference between the percentages given by those men who are experienced in examining salmon, who do not resort to chemical tests, and those witnesses who have resorted to chemical tests. The men who are used to examine salmon simply relying on their eyes and their noses have discarded and found impure practically the same percentage of salmon that those chemically

testing it have done; I am not sure but what they have rejected on an average more than those who have chemically tested the salmon.

"I do not say that the Department, after investigation, where the product was in bulk, where you could treat the bulk as the article, might not reasonably adopt a standard, because there are more or less impurities in all food—it is a common expression that 'every one has to eat his peck of dirt sometime'—and they would be justified in resorting to percentages, but I do not conceive that if you take a number of articles of which you may find ten per cent or twenty per cent of the articles impure, that they are justified in condemning or asking the court to condemn the remaining articles that are not impure.

"The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding, in the absence of positive language leaving no room for doubt, that it was the intent to destroy sixteen hundred cases of good salmon out of a total of two thousand cases. So the motion for a directed verdict will be granted. The clerk will prepare the form and the bailiff will call the jury in."

* * * * *

"This law directs that an article in whole or in part decomposed, putrid or—I have not the language before me, but the court ruled that that does not apply; that it applies to bulk articles where

there is a certain percentage of the entire mass that is putrid, but it does not apply to where a percentage of separate articles, such as cans of salmon, are part of them impure; that it does not give the court any authority to destroy the good cans of salmon. Where an article in bulk, like liquid or a mass, is wholly impure, or partly impure, you can treat the whole of it as one thing, but you are not warranted, in law, in treating cans of salmon as one thing."

Reference is made to the Bill of Exceptions for the complete text of the court's opinion.

ARGUMENT

I. *The ruling of the Court that "The 'Article' of the statute is a single can of salmon" was erroneous.*

(a) A reading of the Food and Drugs Act furnishes a fair interpretation of the word "article."

(b) There is a distinction between the terms "article" and "package" as used in the Food and Drugs Act.

(c) If the interpretation of the court below is affirmed, the past procedure under the Food and Drugs Act must be radically revised.

II. *There was sufficient evidence to warrant the submission of the case to the jury.*

(a) A case should not be withdrawn from a jury unless no recovery could be had upon any view the evidence tended to establish.

III. *The Court erred in directing a verdict on the ground that approximately 1600 cases of good salmon must be destroyed in order to destroy the approximately 400 cans of adulterated salmon distributed throughout the parcel of* 2000 *cases.*

(a) The very determination was in itself a question of fact for the jury.

(b) Question of destruction was not for the jury and the jury's determination on the facts would not have necessitated a consideration of the final disposition of the seized goods. While the question of destruction was for the court, yet its determination was premature, in that it could not arise until after a verdict had been returned in favor of the Government.

(c) It is a well established principle of law that "contraband" goods under the Food and Drugs Act may be followed wherever found and where confused goods are intermingled with other like property, the owner of these goods must lose his

rights unless he is able to separate out his property.

(d) The burden of distinguishing his goods, in case of a confusion of property, is placed on the wrong-doer—the one who produces the confusion.

IV. *A construction should not be applied to a statute which renders it inoperative and which negatives the avowed purposes of the act.*

(a) Nothing in the Food and Drugs Act to indicate that Congress did not intend to include canned and package goods within the provision of Section 10.

(b) An act should be given that construction which will permit of carrying out its avowed purposes.

I.

The ruling of the court that "the 'article' of the statute in a single can of salmon" is erroneous.

It is the Government's position at the outset that the word "article" or "article of food" used in the Food and Drugs Act is used in the generic sense and is to be interpreted as "food product" or "food commodity." An examination of the Food and Drugs Act supports this interpretation. The

title of the Act reads as follows: "An Act for preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors, and for regulation of traffic therein and for other purposes." Foods as used in the title, is undoubtedly used in the generic sense. It will be noted that the use of the word is not qualified in any manner and that the expression "articles of food" is not used.

Section 1 provides "That it shall be unlawful for any person to manufacture within any territory or the District of Columbia *any article of food or drug* which is adulterated or misbranded." "Any article of food" in this section may be said to be synonymous with "food products" or "food commodity" and to be synonymous with the word "foods" as used in the title.

Section 2 provides "That the introduction into any state or territory * * * from any other state or territory * * * of any article of food or drugs which is adulterated or misbranded * * * is prohibited; and any person who shall ship or deliver for shipment * * *, or who shall receive in any state or territory or the District of Columbia from any other state * * *, and

having so received, shall deliver, in original unbroken packages, * * * *any such article* so adulterated * * * or misbranded * * *, or any person who shall sell or offer for sale in the District of Columbia or the territories of the United States any such adulterated or misbranded food or drugs * * * shall be guilty of a misdemeanor." Congress evidently contemplated that "any article of food or drugs" might be contained in a plurality of packages since in the foregoing section it used the expression "in original unbroken packages." Otherwise, if Congress has intended to give the restrictive meaning to the word "article" it would have been necessary to use the expression in the foregoing section "in an original unbroken package." That Congress meant the above use of the word "article" is further shown by the remaining part of Section 2, which reads: "And for such offense be fined not to exceed $200." "Such offense" undoubtedly refers back to, among other things, "and having so received, shall deliver, in original unbroken packages * * * any such article so adulterated or misbranded." In other words one of the offenses under the Act is delivering after receipt in interstate commerce any adulterated or misbranded

article of food in original unbroken packages. Congress in plain language there interprets the word "article" to mean the commodity or product and plainly provides for the punishment for its delivery after it is enclosed in a plurality of original unbroken packages. It is the Government's contention that the shipment of the commodity however enclosed or contained, whether in one package or 96,000 packages, as in the instant case, is the offense.

Sections 3 and 4 provide for the collection and examination of "specimens of foods and drugs." Section 4 provides that examination of "specimens of foods and drugs shall be made * * *, for the purpose of determining from such examinations whether *such articles* are adulterated or misbranded." This can only be interpreted to mean that "such article" refers back to "food and drugs." It does not refer to "specimens" otherwise this section would read "for the purpose of determining whether such specimens are adulterated or misbranded;" the fair interpretation of "such articles" must be *such products or such commodities.*

An examination of Section 10 also sheds some light on the intention of Congress relative to the interpretation of the word "article." The terms

"drug" and "food" as used throughout the Act are obviously used in the broad sense. For instance Section 6 provides "that the term 'drug' as used in this Act, shall include all medicines and preparations * * * and any substance or mixture of substances." There are no qualifying words used with respect to the term drug nor to the term medicines, preparations or substances, they being referred to as articles of medicine in the generic sense. Section 6 defines food to include, all articles used for food, drink, confectionery or condiment by man or other animals, whether simple, mixed, or compound." That phrase would have exactly the same meaning if the word "article" were stricken out and the word "product" or "commodity" inserted in its place.

Section 7 describes the various cases of adulteration under the Act. In the case of drugs paragraph one provides: "If, when a drug is sold under or by a name recognized in the United States Pharmacopoeia it differs from the standard of strength, quality or purity as determined by the test laid down in the United States Pharmacopoeia." Drug there is used in the broad sense and "it" refers to the broad class of drugs, otherwise the section would read "an article of drugs" or language of similar import.

In the case of food the same section provides that if any substance has been mixed or packed with it, or if any substance has been substituted wholly or in part for the article, or if any valuable constituent has been wholly or in part abstracted, or if it be mixed, colored, etc., in a manner whereby damage or inferiority is concerned, or if it contains any added poisonous or other added deleterious ingredients, or if it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, then the "article" or "product" may be said to be adulterated.

It is the sixth paragraph under Section 7 that the libel in the present case is based on. It is the Government's contention that "it" as used in paragraph six refers to the general class or commodity or product and not to the particular can into which the product is packed. The section reads as follows: "If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any part of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal or one that has died otherwise than by slaughter."

Section 8, which describes misbranding, carries out the same or similar references to "drugs,"

"articles of drugs," "foods" and "articles of foods." Sub-paragraph first under Paragraph 4, Section 8, further illustrates the Government's contention with respect to the interpretation of the word "article." It reads: "In the case of mixtures or compounds which may be now or from time to time hereafter known as articles of food, under their own distinctive names, and not an imitation of or offered for sale under the distinctive name of another article, if the name be accompanied on the same label or brand with a statement of the place where said article has been manufactured or produced." It is plain in this section that the term "articles of food" describes the commodity in the broad sense. In fact it was this section that the Supreme Court had in mind in the case of the *United States vs. 40 barrels and 20 kegs of Cocoa Cola*, 241 U. S. 265, in which Mr. Justice Hughes said: "A distinctive name is a name that distinguishes. It may be a name in common use as a generic name, e. g., coffee, flour, etc. Where there is a trade description of this sort by which a product of a given kind is distinctively known to the public, it matters not that the name had originally a different significance. Thus, soda water is a fair trade description of

an article, which now, as is well known, rarely contains soda in any form." It is undoubtedly true that the Supreme Court in this decision had in mind that soda water was an article of food and used the term article in the sentence above quoted in the same sense that Congress intended it should be used in the Act.

In the case of *McDermott et al vs. Wisconsin*, 228 U. S. 115, Mr. Justice Day said: "The Food and Drugs Act was passed by Congress, under its authority to exclude from interstate commerce impure and adulterated food and drugs and to prevent the facilities of such commerce being used to enable such articles to be transported throughout the country from their place of manufacture to the people who consume and use them, and it is in the light of the purpose and power extended in its passage by Congress that this Act must be considered and construed. *Hippolite Egg Company vs. U. S.*, 220 U. S. 45." While the Court in the foregoing did not attempt to interpret the word "article" it will be noted that the term "such articles" in the foregoing quotation refers back to "food and drugs" which are undoubtedly used in the broad sense. "Such articles" could be stricken out of the foregoing paragraph and the word

"products or commodities" inserted without changing the meaning. In the same decision the word "package" is interpreted to mean the immediate container of the article in which it is enclosed for consumption by the public. It is significant that the Court said, "Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming at the contents of the package as it shall reach the consumer, for whose protection the Act was primarily passed, and it is the branding upon the package which contains the article intended for consumption itself which is the subject matter of regulation." In view of the fact that Congress was aiming at the contents of the package, it may be said that it is the commodity in the case of adulteration that Congress is seeking to regulate rather than the specific package or the can in which the commodity is contained.

The foregoing theory is further substantiated by the case of *United States vs. 7 cases etc., Eckmen's Alterative*, 239 U. S. 510 in which Mr. Justice Hughes said: "But the question remains as to what may be regarded as "illicit" and we find no ground for saying that Congress may not condemn the interstate transportation of swindling preparations designed to cheat credulous suf-

ferers and make such preparations, accompanied by false and fraudulent statements, illicit with respect to interstate commerce, as well as, for example, lottery tickets."

A situation which is not dissimilar to the present controversy arose in the District of Colorado, in the case of the *United States vs. 462 Boxes of Oranges*, Notices of Judgment 5402. In condemning the entire shipment because a substantial percent of decomposed oranges were intermingled with the sound oranges, Judge Lewis said:

"There is no doubt about the facts in this case, but I think there is question as to whether or not the facts bring the shipment within the terms of the Act of Congress. We declined to meet this question heretofore in connection with a shipment of apples; that is, we refused to issue the writ of seizure. The charge was that some of the apples were rotten, but on preliminary inquiry it appeared that many of them were sound—were in good condition for use, and could be readily seen and separated from the unsound. It is pretty difficult to face our minds from the idea of deception in the sale of this kind of fruit in the condition that the evidence shows these oranges are, and yet that element ought to be eliminated, because the Act of Congress in no sense undertakes to reach the purpose of the Act by bringing within its terms any fraudulent conduct in the sale of the article. *You can not determine*

the condition of an orange from looking at it as you can an apple. Now, the evidence, I take it, does bring the shipment within the literal terms of the act; the oranges were decomposed on the sense that on account of prior freezing they were undergoing a deteriorating change; that is, a large per cent of them."

In the case of *United States vs. 5060 Cans of Tomato Pulp*, Notices of Judgment 5527, Judge Landis treated the word "article" as refering to the product. Throughout his charge to the jury on numerous occasions, he spoke of the product, "Tomato Pulp" etc., as synonymous with "article," typical instances are quoted:

"Gentlemen of the Jury, in this case there is one fact for you to find, and that fact is whether or not the *product* involved in this inquiry was composed, in whole or in part, of decomposed or filthy vegetable substance."

Again he says:

"Now, it is not a question solely whether this *stuff*—I do not use the word "stuff" in any significant way—*this article*, is fit or unfit for food."

And again:

"The question is, whether or not in manufacturing the ten per cent bad tomatoes did go in, or the five per cent did go in, that is the question, and if you find it did, your verdict will have to be

against the *Tomato Pulp*, even though you believe that you could eat the *whole cargo of the product* without suffering any evil consequences."

It is evident that Judge Landis took the view that "article" as used in the Act referred to the product or commodity.

In the case of *United States vs. 408 Bushels of Oysters in Shells*, Notices of Judgment 4922, Judge Hand treated the word "article" as refering to the product. In his charge to the jury he said:

"There is one other thing that I have not mentioned: certain oysters were examined, other oysters were not examined. The oysters examined, were, of course, very few as compared with the large bulk of 408 bushels of oysters. If you condemn the other oysters which have not been tested here at all, that is, individually, specifically, you will have to find, of course, in the first place, that there was found filth in the oysters that were examined; in the second place that those were fair specimens, so that the other portion of the 408 bushels were similar, and would be properly condemned with those that were actually found to contain excrement. So the question is first whether any of these oysters were filthy to a substantial degree. If you find the oysters examined were filthy to a substantial degree, and that is the result of your finding, and you find there is a preponderance of evidence to that effect then those

would be condemned. If you find they were fair samples of the rest, then you would condemn the rest."

In the case of the *United States vs. Watson, Durand-Kasper Grocery Company*, Notices of Judgment 5543, in which the product was candy in buckets, a persuasive argument is found which tends to substantiate the Government's position that "product" is the article or that the "entire parcel" is the article. In ruling on the question as to what was the unit of the offense, Judge Pollock said:

"In such case may the Government's case out of the single transaction of sale, purchase, and shipment constitute more than one offense under the terms of the Act? Under the provisions of the Act, it is seen to be its purpose, by Section 1, to prohibit within territory under the jurisdiction of the United States, the manufacture or misbranding of foods and drugs. By Section 2 of the Act to prohibit the shipment or offer for shipment in interstate commerce of adulterated or misbranded *food or drug products.* Conceding, therefore, the candy complained of in this case was adulterated in violation of the Act, yet, as there was but a single sale, purchase, and shipment of the adulterated product, as the entire matter charged grew out of a single transaction and a single shipment, it must follow the plaintiff can carve out of this single transaction but a single offense. Although

there were 250 pails of candy shipped, yet here, as under the provisions of the Twenty-eight Hour Law, the shipment made or offered by the defendant must be taken as the unit, although it may consist of many parcels. No greater reason appears for dividing the shipment in question under the Food and Drugs Act, all being comprehended under the general term "confectionery," into different lots or parcels than would appear for making the many different head or cars of stock a separate violation of the Twenty-eight Hour Law. (*B. & W. Southwest Railroad vs. U. S.*, 220 U. S. 94.)"

If the interpretation placed on the word "article" by the court below in the case at bar is allowed to stand, it will necessitate a radical revision of the procedure under the Food and Drugs Act, procedure which has been in use throughout the various District Courts since the passage of that Act. Pleadings have been uniformly prepared on the assumption that the "article" was the "product" or the "lot," and each count, in the criminal informations, have been drawn to cover each particular shipment of adulterated or misbranded food or drugs. The new procedure would require that each count cover each particular can or package, and would result in the Food and Drugs Act becoming a drastic measure, in many instances the counts on each shipment might run

into the hundreds. In the present case, if a criminal charge should be instituted, over a hundred counts could be brought, on the basis of the showing made by the Government's evidence in the court below. There should be a very convincing reason advanced, before a time-honored procedure should be overturned, and before so drastic a construction should be placed on the act, as is suggested by the interpretation of the court below.

This argument is reenforced by the case of *Elliott vs. Railroad*, 99 U. S. 573, wherein it was held that penalties are never extended by implication; they should be expressly imposed or they cannot be enforced. If the lower court's construction of the word "article" be adopted in the enforcement of this statute its penalties will be increased a hundredfold—an extreme result, wholly opposed to the reasonable accomplishment of the remedial purposes of this law.

II.

There was sufficient evidence to warrant the submission of the case to the jury.

It is the Government's position that there was ample evidence to warrant the submission of the case to the jury. The question of fact raised by

the pleadings, as to whether the salmon libeled was composed in whole or in part of filthy, decomposed or putrid animal substance, and was therefore adulterated, was one for the determination of the jury on the evidence, and the court erred in failing to submit that question to the jury.

The record clearly establishes the fact that of the salmon examined 18.8 per cent was tainted or putrid and an additional 10.7 per cent was stale or off. This showing was undoubtedly sufficient evidence to justify the case going to the jury, and even if the ruling of the court below that "the 'article' of the statute is a single can of salmon" is correct, yet, since there was evidence that over 100 cans of the various samples examined were putrid and tainted, and many more stale or off, the court erred in refusing to let the case go to the jury on that showing alone. Even if the jury could not find on the evidence that all of the shipment was adulterated, yet it could have determined that those 100 cans examined were adulterated and the verdict could have been returned under instruction of the court as to that amount. (*U. S. vs. 1000 Cases of Canned Tomato Puree*, Notices of Judgment 4597.)

(a) A case should not be withdrawn from a jury unless no recovery could be had upon any view the evidence tended to establish.

It is axiomatic that "the case should not have been withdrawn from a jury unless the conclusion followed, as a matter of law, that no recovery could be had upon any view which could be properly taken of the facts the evidence tended to establish." (*Texas & Pacific Ry. Co. vs. Cox*, 145 U. S. 606.) See also *Bradley vs. U. S.*, 264 Fed. 79.

It certainly cannot be said that "no recovery could be had" in the instant case, where the evidence plainly established that at least a portion of the shipment was composed of cans containing putrid, tainted and stale salmon.

III.

The court erred in directing a verdict on the ground that approximately 1600 cases of good salmon must be destroyed in order to destroy the approximately 400 cans of adulterated salmon distributed throughout the parcel of 2000 cases.

In the ruling on the motion by the claimant for a directed verdict the court below based his reason for granting the motion on the following grounds: "The exigencies of the case, the danger to the

public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I concluded it does not warrant the court in concluding in the absence of positive language, leaving no room for doubt, that it was the intention to destroy 1600 cases of good salmon out of a total of 2,000 cases, so the motion for a directed verdict will be granted."

This ruling, evidently based on a misconception of the Act fails to disclose a convincing reason for the ruling. Even granting, for the purpose of this argument, that Congress did not intend that where adulterated food was hopelessly intermingled with unadulterated food, the whole might be destroyed if there was no practicable manner of sorting or reconditioning, still the Court was in error in taking the matter from the jury without first having that fact determined by the jury.

In order for the Court to reach the determination that some 1600 cases of the parcel of salmon seized were unadulterated, it was obviously necessary to pass on a question of fact which was properly one for the jury. It was not admitted by the

claimant that 400 cases of the product was bad, and it was not testified to by any of the Government's witnesses that 1600 cases of the product were unadulterated. The assumption on which the ruling was based could only be arrived at by a series of deductions which only a jury could rightfully make.

There is no doubt but that the Court at the proper stage in the trial could have passed on the very point of law on which the motion to direct a verdict was based. After a verdict had been returned in favor of the Government and the question of the disposal of the condemned goods was properly before the Court, then, and then only, would it have been a matter for judicial determination. Then, and not until then, would it have been proper for the Court to conclude that Congress did not intend to destroy 1600 cases of good salmon because some 400 cases of adulterated goods were intermingled therewith.

It is manifest that the most controlling reason in the mind of the Trial Court for the adoption of the extreme meaning of the word "article" was the apparent necessity of avoiding a construction which would result in the condemnation of the portions of the consignment of food in a mixed

shipment which are uncontaminated. This reason fails to be convincing in view of the possibility of another construction of the Act which placed the disposition of goods after they are condemned as contraband within the discretion of the court. It has been the uniform practice of courts since the adoption of the Food and Drugs Act to permit the sorting of goods after judgment of condemnation and to permit the return to claimant of sound portions of consignments condemned. This judicial discretion which can be gathered from the provisions of Section 10 has never been questioned except in one case where it was exercised against the returning of wholesome goods to claimants who had been found to be persistent violators of this statute. This case is reported in Notice of Judgment No. 7691. In that case Judge Hand declared that the disposition of goods after condemnation was a matter for the exercise of sound discretion by the court.

Section 10 of the Food and Drugs Act provides "that any article of food, drug, or liquor that is adulterated or misbranded within the meaning of this Act, and is being transported from one state, territory, district, or insular possession to another for sale, or, having been transported, remains un-

loaded, unsold, or in original unbroken packages, * * * shall be liable to be proceeded against in any District Court of the United States and within the District where the same is found, and seized for confiscation by a process of libel for condemnation. And if such article is condemned as being adulterated or misbranded, or of a poisonous or deleterious character, within the meaning of this Act, the same shall be disposed of by destruction or sale, as the said Court may direct * * *; Provided, however, that upon the payment of the costs of such libel proceedings and the execution and delivery of a good and sufficient bond to the effect that such article shall not be sold or otherwise disposed of contrary to the provisions of this Act * * * the Court may by order direct that such articles be delivered to the owner thereof."

It will be seen that ample provisions were made by Congress for just such a contingency as would have faced the Court below after a verdict. The seized goods could then have been taken down under bond for sorting or reconditioning, the burden remaining where it originally rested—with the claimant—to see that the goods were properly reconditioned and that they were not sold in

violation of the terms of the Food and Drugs Act. In other words, the claimant was responsible for the filthy, putrid and decomposed fish which were distributed throughout the shipment and after a verdict the responsibility would still be with the claimant to recondition. The Court's present ruling erroneously shifted the burden to the Government to seek out and find each can containing adulterated fish throughout the entire parcel rather than to allow the burden to remain where it originally lay.

It is a well established principle in law that "contraband" goods within the meaning of the Food and Drugs Act may be followed wherever found. *McDermott et al vs. Wisconsin*, (228 U. S. 115). It is also a well established rule that where one fraudulently, wilfully or wrongly intermingles his goods with those of another so that there is no evidence to distinguish the goods of the one from those of the other, the wrong-doer forfeits all of his interest in the mixture to the other.

The Idaho, 93 U. S. 586;
Williams vs. Morrison, 28 Fed. Rep. 873;
Graham vs. Plate, 40 Col. 598;
Beach vs. Schmultz, 20 Ill., 190;
Dunning vs. Stearns, 9 Barb. N. Y. 634;
Jenkins vs. Steanka, 19 Wis. 126.

Where the trespasser sold turpentine and resin to defendant, some of which the trespasser had taken from the unpatented homestead entry, the Government was entitled to recover the value of the whole mass, unless that taken from the homestead was determinable. *Union Naval Stores Co. vs. U. S.* 202 Fed. 491.

It is therefore the position of the Government that the claimant when he shipped a parcel of salmon which contained a substantial portion of cans packed from fish which was filthy, putrid or decomposed—and therefore adulterated—he did so at his own peril and if it is impossible to segregate those cans which contain putrid fish from those containing unadulterated fish the entire shipment should be condemned and forfeited under the provisions of the Food and Drugs Act. As has been previously pointed out, if it is possible to recondition the fish, it should be done under the supervision of the shipper, under the well known theory that in cases of a confusion of property the burden of distinguishing is placed on the wrong-doer, all the inconvenience of the confusion being thrown on the party who produced the confusion and it is for him to distinguish his own property or lose it.

Lehman vs. Kelly, 68 Ala. 197;

Elgin First National Bank vs. Schween, 127 Ill. 580;

Stuart vs. Phelps, 39 Iowa 20;

Hart vs. Ten Eyck, 2 Johns Ch. (N. Y.) 108;

Mayer vs. Wilkins, 37 Fla. 244;

Sampson vs. Rose, 65 N. Y. 411.

The Food and Drugs Act, when read as a whole, also supplies a convincing argument against the court's ruling. Section 2 plainly prohibits the introduction into any state from any other state any article of food which is adulterated, and stamps the act of shipping or delivery for shipment from one state to another as a misdemeanor. It could not be said that the shipper in the present case had not shipped adulterated canned salmon, and it is the theory of the Government that the Act, in Section 10, provides an alternate method of procedure based on the same violation of the Act as that described in Section 2. Is it logical to say, in view of the plain violation of Section 2, that the same goods when attacked under the provisions of Section 10, are not liable to condemnation and forfeiture?

IV.

A construction should not be applied to a statute which renders it inoperative and which negatives the avowed purposes of the Act.

The Court erred in applying a construction to the Food and Drugs Act which would render Section 10 of the Act inoperative with respect to all canned or package goods. Doubtless Congress intended to include package and canned foods within the purview of the Act, inasmuch as the Act contains no intimation to the contrary. Throughout the Act the term "article of food" as used is unqualified and in Section 6 the term is defined as follows: "The term 'food' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound." It is also doubtless true that Congress intended to include canned salmon within the foregoing definition, and a construction of the Act which excludes any article which plainly falls within the foregoing definition of food is erroneous.

The great fundamental rule in construing statutes is to ascertain and give effect to the intention of the legislature.

McDermott et al vs. Wis., 228 U. S. 115;
Shulthis vs. MacDougal, 162 Fed. 33;
Blanc vs. Bowman, 22 Col. 23;
People vs. Dana, 22 Col. 11;
People vs. Willison, 237 Ill. 584;
Farmers Bank v. Hale, 59 N. Y. 53.

Every statute must be construed with reference to the object intended to be accomplished by it. (36 Cyc. 1110.)

U. S. vs. Musgrave, 160 Fed. 700;
St. Louis etc. Ry. Co. vs. Delt, 158 Fed. 931;
State vs. Pollman, 51 Wash. 110;
People vs. Dana, 22 Col. 11;
Hathorn vs. Natural Carbonia Co., 149 N. Y. 326.

The construction should be given to a statute which is best calculated to advance its object by suppressing the mischief and securing the benefits intended.

U. S. vs. Jackson, 143 Fed. 783;
Wheeler vs. McCormick, 8 Blatchf. 267.

If the purpose and well ascertained object of a statute are inconsistent with the precise words, the latter must yield to the controlling influence of the legislative will resulting from the whole Act.

Commercial Bank vs. Foster, 5 La. Am. 516;
State vs. Clark, 29 N. J. L. 96;
U. S. vs. Jackson, 143 Fed. 783.

It is submitted that the judgment of the District Court should be reversed, with directions to grant the plaintiff-in-error a new trial.

Respectfully submitted,

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In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

A. O. ANDERSON & COMPANY, Claimant of 1974 CASES OF CANNED SALMON LABELED IN PART, "Hypatia Brand Pink Salmon" SHIPPED BY ALASKA HERRING & SARDINE CO. CANNERY,
Defendant in Error.

No. 3899

Upon Writ of Error to the United States District Court for the Western District of Washington, Northern Division.

HON. EDWARD E. CUSHMAN, *Judge*

BRIEF OF DEFENDANT IN ERROR

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ATTORNEYS FOR DEFENDANT IN ERROR

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STATEMENT

The statement of the case made by counsel for the Plaintiff in Error is incomplete. It is fairly accurate so far as it goes but it omits important

facts and the testimony in support thereof. The statement purports to set forth substantially the testimony of each witness who testified for the Government but fails to include certain portions of the testimony of such witnesses that has a persuasive, if not controlling influence upon a proper determination of this controversy. No chemical or bacteriological examinations were made of any of the cans of salmon examined by the witnesses on the part of the Government. The examinations made by these witnesses were trade examinations. The tests made were by the sense of smell of such witnesses, all of whom had been employed in the United States Bureau of Chemistry for many years. All of these witnesses testified that a chemical or bacteriological examination is not usually applied by the Bureau of Chemistry in the examination of salmon for the determination of its purity or adulteration. The witness, A. W. Hansen, examined 384 cans taken from 384 cases. He testified that he found 71 tainted cans, or a percentage of 18.4 per cent. (B. Ex. 35). The other witnesses only examined 240 cans taken from 240 cases and testified that they found a percentage of tainted cans of from 17.9 to 20 per cent. (Brief p. 10).

The cans of salmon were selected by the Gov-

ernment witness E. A. McDonald. Mr. McDonald testified that one Monroe was present at the selection of the samples, representing the claimant (B. Ex. p. 28), but nowhere does it appear that Monroe agreed that the samples selected were representative of the entire parcel of 1974 cases. The cans examined by the Government witnesses were divided into parcels of 12 cans and the result of the examination disclosed that the quantity of tainted cans in such parcels of 12 varied to a considerable degree, the last dozen showing no taint of any kind. (B. Ex. p. 36). The testimony of the other witnesses on behalf of the Government was substantially to the same effect. The following question was asked the witness Hansen upon cross-examination:

"Q. The point that I am getting at is this: The Bureau of Chemistry has arbitrarily fixed a standard for tainted goods as to what will be allowed to go into commerce and what will not be allowed to go into commerce? I mean by this that they have established in the case of salmon a standard that any parcel of salmon may be permitted to go into commerce if the tainted cans or stale cans do not exceed ten percent?"

The attorney for the Government said:

"We object to that. We are not insisting upon any standard." (B. Ex. p. 40).

The witness Hansen further testified that the Bureau of Chemistry has passed parcels of salmon that ran from five or six per cent, and stated that the highest percentage of adulterated salmon that had been passed by the Bureau of Chemistry into the trade was probably about six per cent.

The witness Balcom testified that the Bureau of Chemistry had allowed salmon to go into the trade where the percentage of adulterated salmon was around ten per cent. He says:

"When we first began the examination of this canned salmon in large quantities, there was such a large percentage of it on the market that was in very bad condition that merely as an administrative policy we had to adopt some rule as to where we should bring an action and where we should let the matter go—and for a time there was a certain limit, somewhere around ten per cent. That was several years ago; and the reasons for that—for the percentage being so high at that time, were various. I will mention perhaps two. One was that we didn't know so much about the business then as we do now, but the principal one was that there was such large quantities of salmon on the market that were so much worse than ten per cent, that we considered that the best we could do with our limited funds and personnel was to get those parcels off the market that were worse than ten per cent. If we succeeded in doing that at that time, we were doing mighty well." (B. Ex. p. 70.)

All of the witnesses for the Government stated that they were unable to specify any instance of

illness, sickness or death resulting from the eating of adulterated salmon such as those in controversy here. (B. Ex. pp. 37-45-67.) The witnesses for the Government further stated that any ordinary person possessing the ordinary sense of smell could as easily detect tainted salmon when the can was opened as the experts of the Government. (B. Ex. pp. 55-66-67.) All of the witnesses agreed in the view that the eating of salmon such as examined here was not injurious to human health. The following question was propounded to Dr. Balcom on cross-examination:

"Q. Now, Doctor, in the conduct of your business in the Bureau of Chemistry, you don't and can't undertake to literally say that nothing shall go, in the way of food product, into interstate commerce, unless it is entirely free from decomposed matter, can you?

"A. I don't believe that would be an administrative possibility.

"Q. It would be a practical impossibility?

"A. Yes.

"Q. —to literally construe that law, wouldn't it?

"A. I think so; yes, sir.

"Q. Therefore, the Bureau of Chemistry, in recognition of the fact, have made, without possibly fixing any definite standard—they have allowed and daily allow food products to go into interstate commerce that are more or less tainted or bad or defective cans, is that so?

"A. They have to make some rules for administrative guidance, and of course realizing that it is useless to make or adopt rules for their guidance that cannot be upheld as a practical matter, and, necessarily, they have to adopt some rules of that kind.

"Q. Well, nevertheless, in view of human infirmities and the infirmities attending the packing of food products, the Bureau of Chemistry has been compelled to recognize that they must grant some leeway, haven't they?

"A. Yes, and they have to take those things into consideration, necessarily; we all have to do that.

"Q. In order to practically carry on the business?

"A. Yes, sir." (B. Ex. pp. 67-68-69).

Counsel for the Government in their statement quote a portion of the opinion of the Court in the cause but do not quote the entire opinion. We refer the Court to the full opinion as found in the Bill of Exceptions at page 76.

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ARGUMENT

We shall, in the first instance, endeavor to present our argument in support of the correctness of the decision of the Lower Court and after doing so will attempt to answer such portions of

the brief of the Government as are not replied to in our original argument.

The action is predicated upon the sixth subdivision of paragraph 7 of the Pure Food Act (3 *Fed. St. An.* (2nd Ed.) 371-372), which reads as follows:

"Sec. 7. That for the purposes of this Act an article shall be deemed to be adulterated: * * * in the case of food * * * Sixth. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter." (34 St. L. 769.)

Section 2 of the Food and Drugs Act makes it a misdemeanor for anyone to introduce into interstate commerce or to offer for sale any adulterated foods. Section 10 of the same Act provides that the goods themselves shall be seized for confiscation by a libel or proceeding *in rem* when adulterated within the meaning of the Act. Two remedies are therefore vested in the Government by the Act—one by criminal proceedings against the person who handles the adulterated goods, and the other by an action *in rem* for confiscation against the goods themselves. The statute is therefore a penal statute in its nature and must

be strictly construed as all penal statutes must be where fines or penalties are imposed.

"A law which takes away one's property or liberty as a penalty for an offense must so clearly define the acts on which the penalty is denounced that no ordinary person can fail to understand his duty and the departure therefrom which the law attempts to make criminal, since one cannot be said to wilfully violate a statute which is so contradictory or blind that he must guess what his duty is thereunder." (*Brown v State*, 119 N. W. 338.)

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large."

James v. Bowman, 190 U. S. 127.

Interpretation of Subdivision Six of Section 7 of the Food and Drugs Act.

A careful examination of this section raises at once two questions—first, whether the Act is to be literally construed, and, second, if not, what test or standard is to be applied to determine the extent of the adulteration contemplated by the statute. We will first consider the application of a literal construction of the statute.

The statute provides that a food product is adulterated "if it consists in whole or in part of

a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food." The language is comprehensive. Literally construed it would prohibit the introduction into interstate commerce of any food product that contained any decomposed substance, no matter how slight. No one will deny that decomposition sets in immediately after the death of animals or fish. It may be slight in extent, but nevertheless, the decomposition exists and a literal interpretation of the language of the Act would prohibit the introduction into the trade of a food product containing the slightest percentage of decomposed matter or substance. Such a construction would render commerce in canned salmon, vegetable and meat products and similar commodities impossible. The purpose of the Act was to facilitate and make safe such commerce in such commodities. The application of a literal construction would tend to prohibit the introduction of such products into the trade between the states and foreign countries. The purpose of the Act by such an interpretation would therefore be frustrated.

Under this provision the Government sought to confiscate 1038 cases of Tabasco Flavor Catsup in the United States District Court for the

Eastern District of Missouri. (Service and Regulatory Announcements of the Department of Agriculture, page 395.) In his instructions to the jury in that case, Judge Pollock discussed at considerable length the proper interpretation of subdivision six, and said:

"Now, the precise charge made in the complaint for libel is this: That for the purpose of this act, or article in the law—it says to be adulterated, in the case of food; then, paragraph 6—'If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of any animal unfit for food, whether manufactured or not, or if it is a part of a diseased animal, or one that has died otherwise than by slaughter.' Now the defendant in the case denies adulteration in the matter charged in this food product, tomato catsup, and thus the matter is fought. At the trial here the real contention and complaint of the Government is, not that there was, in the catsup that was said to be condemned, any putrid matter, because the word putrid, used in this section of the act, has application to animal matter, but it is that the tomatoes that were used by this company in the manufacture of this tomato catsup were decomposed, or rotten, in whole or in part, to such an extent as is violative of this section of the statute. There is no contention made here in this evidence that the plant, or, speaking plainer, this Tomato Products Company, was not kept in a reasonably cleanly condition, or that the vat or pipes through which this product was passing while it was being manufactured were allowed to become filthy and dirty so as to injure the product in that way, but it is as I understand the evidence adduced, solely and

alone on the facts that there was used in the manufacture of this catsup rotten tomatoes to such an extent as to violate this provision of the act.

"Now, gentlemen, that brings us of a necessity, to a determination of what the founders intended by the enaction of this provision. In certain other provisions there is used the term—for instance, in paragraph one of this section: 'If any substance has been mixed and packed so as to reduce, lower, or injuriously affect its quality or strength.' That is to say the law-making power laid down the test. In another provision down here, the law-making power placed another test on the matter, that is, 'if it contain any added poisonous or other added deleterious ingredient which may render such article injurious to health.' So, if this were a proceeding under the fifth paragraph and the inquiry was as to whether there was an adulteration of something else, and in such a manner as to make it deleterious to health—you will notice that the paragraph which we are following lays down no test whatever. Now, let me read it again: 'If it consists in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance.' Now, the Congress, in section six, based a reasonable application of this section to the practical business affairs of life. In such case the Congress intended that it should apply to the absolute term. For instance, supposing you were manufacturing pepper, and you would add to that pepper something that would not adhere to the pepper grain itself, this would be prohibitive; that is, Congress would make it prohibitive to add ground peas. And Congress assumed here that putrid animal flesh was not healthful and not good, so they prohibited it—the sale of putrid animal matter—and they also prohibited the use of decomposed vegetable matter in the manufacture

of food products. Now, of course, if this catsup was manufactured altogether out of rotten tomatoes it would not be regarded as fit for human beings to consume. If it was some substance that was not inherent to the tomato itself it could be easily prohibited in that case, and the prohibition there be easy. But the word, packages, here, with which we are principally interested, in this trial, is in its everyday use, not in the scientific sense. In the scientific sense wine or beer would be absolutely prohibited in this case; as you gentlemen all know the grain with which beer is made and the grapes with which wine is made are fermented.

"Again there are lots of food products that the Congress—made out of partially decomposed vegetable matter, in some instances at least—that the Congress didn't intend to prohibit. Many of us like a dish called youget that has gone through a process of decomposition. Again, take an article like sauerkraut; there is a certain stage of decomposition reached in there that the Congress did not mean. Again, you take cheese. In the ripening process decomposition has taken place and the Congress did not mean to prohibit the manufacture of it, or sauerkraut. On the other hand, Congress did not intend to prohibit the manufacture of cider. While it says 'in whole or in part decomposed,' no man could engage in the manufacture of cider because you might possibly make a bottle of cider or a gallon of cider that no part of it has been decomposed, but you could not engage in the manufacture of cider, because to find perfect apples that are not in part decomposed would be absolutely prohibitive of the making of cider. So, if we had to make tomato catsup out of tomatoes which were not in part decomposed we could never make any tomato catsup, because it would be a matter of impossi-

bility for anyone to engage in the manufacture of catsup, and there would be some decomposed tomato matter going into the product. The care with which you would have to conduct a business of that kind would absolutely prohibit the business. So, what the Congress meant—it meant this: that in the manufacture of tomato catsup, which is the subject of this, that the rule of reason should enter; that is to say, a *factory that exercised a reasonable, prudent caution in collecting the tomatoes and assorting those that went into the cylinder so as to cut out any, unreasonably so, of decomposed tomatoes*—the matter of a reasonably prudent, careful, and intelligent man, engaging in his affairs, would do—that he be protected under the law, unless he became careless in his business and allowed rotten tomatoes to go in there in a manner that a reasonable, prudent man, making a product for consumption of his own, would not do.

"The burden of proof is on the plaintiff in this case. It is admitted by the intervener that they did make and manufacture the product at their plant. The plaintiff in this case attempts to show that in the selection of the tomato from which this catsup was prepared, in this case, that the reasonable care and caution was not used, to keep out rotten tomatoes, that a man of ordinary care and prudence would use. If the Government has established that, you will then find that it is adulterated, and find for the plaintiff. If the Government has failed to establish that, you will find that it is not adulterated, and find for the claimant.

"I have tried to bring the attention of the jury down to what I deem, under this law, a crucial test case, in so far as a substance that might result in adulteration of a food product from

the very adherent food product itself. This is the first case that I have known to be tried under the law, and *as the law-body has not laid down a test, then of necessity the court must make a test*, and it is one of the primary rules with all laws, that they must be free, so that is what I am giving you to determine the facts in this case. * * * There have been certain requests in this case, to instruct to discharge. In so far as I have not given them, they will be treated as refused. It is a matter of considerable concern to the parties, and you will take it as such and determine from the evidence in the case and the manner I have indicated, whether or not *this food product is, or was, decomposed and filthy to an unreasonable extent, or to the extent* that a reasonably prudent, cautious, and diligent business man in the manufacture of a product to be consumed by his family wold not permit."

The Court in the tomato catsup case clearly reached the conclusion that the Congress could not have intended to have placed a ban upon the introduction into interstate commerce of all food products that had in them any decomposed or putrid matter. He declined to hold that the Congress ever intended to prohibit the introduction into trade between the states of any slight or reasonable amount of decomposed substances. Such an interpretation would annul the very purpose of the Act to regulate commerce in food products.

The Court in that case, therefore, held that subdivision six could not be literally interpreted

and he therefore adopted a liberal interpretation and applied to the statute the rule of reason and then proceeded to give it a liberal interpretation.

He held that the statute really meant, and was intended by the Congress to mean that no food products should be barred from introduction into interstate commerce unless they contained an unreasonable quantity or percentage of adulteration or of decomposed animal or vegetable substance. He applied as a standard or test the rule in the preparation of such products that an ordinarily prudent manufacturer would utilize in the conduct of his own business.

The effect of his decision was that the jury should find the claimant guilty if, in the judgment of the jury, the quantity of decomposed matter contained in the catsup was unreasonable in extent or amount. He left to the jury the determination of the reasonableness or unreasonableness of the decomposed matter and the determination of its adulteration within the meaning of the Act. In other words, it was left to the jury to use their own judgment as to what was reasonable or what was unreasonable.

As we have seen from the testimony of Dr. Balcom, who has been employed as an expert by

the Bureau of Chemistry for more than twenty years, no standard as to the percentage of decomposed matter had ever been adopted by the Bureau of Chemistry. Dr. Balcom also testified that it was an administrative and practical impossibility to literally construe the Act and prevent the introduction into commerce of food products containing decomposed or putrid animal or vegetable substance. Mr. Falknor, the attorney for the Government, stated in the trial that the Government claimed that no standard had ever been fixed and further stated that Dr. Balcom had so testified, which was true.

It is a fair inference from the testimony of Dr. Balcom and the other witnesses for the Government that subdivision six could not be literally construed and that the Department of Agriculture and the Bureau of Chemistry had so construed the Act. It also appears from the testimony that varying percentages of decomposed matter in canned salmon had been allowed by the Bureau of Chemistry to go into commerce—in some cases, five, six, seven, eight and ten per cent. and possibly larger percentages, all depending upon the exigencies of the condition at the time prevailing.

Manifestly this rule of action would not have prevailed in the Bureau of Chemistry had it not been that the Bureau recognized that the eating of such salmon was not injurious to human health. The fact that it was not injurious doubtless controlled the activities of the Bureau of Chemistry.

This view as to the absence of danger to health may have influenced the Bureau of Chemistry and it may account for its failure to adopt in any published regulation a particular standard as to what percentage of decomposed matter would bar the introduction of the food product into commerce.

It therefore seems to us that the courts and the Bureau of Chemistry have practically construed the Act to mean that a food product would not be allowed to go into commerce if it contained an unreasonable quantity of decomposed matter, but the Bureau has failed, according to the evidence, to establish any standard as to what would be a reasonable or unreasonable percentage of decomposed matter. In other words, the Bureau itself, as well as Judge Pollock have construed subdivision six to mean that an article of food is adulterated within the meaning of the Act, if in the opinion of the jury it contains an un-

reasonable quantity of putrid or decomposed matter, but such an interpretation, applying the standard of reasonable or unreasonable percentages of decomposed matter brings this case under the ban of numerous decisions of the Supreme Court of the United States. It is plain that subdivision six cannot be construed literally and that it must be given a liberal interpretation. The only liberal interpretation that can be applied to the Act is that of reasonableness adopted by Judge Pollock and if the standard or test of reasonableness be applied the provision of the Act becomes so vague and indefinite as to render it unenforceable.

Reasonable Standard or Test.

If the Act had incorporated in its provisions the standard of reasonable percentages as indicated heretofore, the Act would necessarily be held unconstitutional by the courts. The standard of reasonableness in a penal statute is with practical unanimity held by the courts to be no adequate standard or test. Under such a test different juries would interpret reasonableness according to their individual views and the result would vary with different juries or courts. The manufacturer of salmon is entitled to know in advance under a penal statute the extent of the adulteration that

will prohibit the introduction of his goods into commerce. A conviction based upon the standard of reasonableness renders the Act too vague and uncertain for enforcement.

In the case of *United States v L. Cohen Grocery Co.* (255 U. S. 881, 41 Sup. Ct. Rep. 298), the court had under consideration the provision of the Lever Act making it unlawful for any person wilfully to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries. In its opinion, the Court said:

"The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether the words 'that it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the subject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or ade-

quately guard against. In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury. And that this is not a mere abstraction, finds abundant demonstration in the cases now before us, since in the briefs in these cases the conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry out the statute in cases brought before them are vividly portrayed. As illustrative of this situation we append in the margin a statement from one of the briefs on the subject. And again this condition would be additionally obvious if we stopped to recur to the persistent efforts which, the records disclose, were made by administrative officers, doubtless inspired by a zealous effort to discharge their duty, to establish a standard of their own to be used as a basis to render the section possible of execution."

The reasoning of the Court in its construction of the Lever Act applies with controlling force in this action. Numerous other courts, both state and federal, have applied the rule announced in the *Cohen Grocery Co. case* and have refused to sustain convictions under statutes providing no other standards than that of reasonableness.

In the case of *Cook v State* (59 N. E. 489) the Supreme Court of Indiana refused to sustain

a conviction under a statute which made it an offense to haul over turnpikes and graveled roads in specified weather loads over 2,000 pounds in narrow-tired wagons, or of more than 2,500 pounds in broad-tired wagons. In its opinion, the Court said:

"The language of a criminal statute cannot be extended beyond its reasonable meaning, and, wherever the court entertains a reasonable doubt as to the meaning, the doubt must be resolved in favor of the accused. The court must expound what it finds written, and cannot import additional meaning without sufficient indication thereof in the words of the statute, with such aids thereto as the established rules of law authorize."

And the Court further said:

"There must be some certain standard by which to determine whether an act is a crime or not; otherwise cases in all respects similar, tried before different juries might rightfully be decided differently, and a person might properly be convicted in one county for hauling over a turnpike in that county, and acquitted in an adjoining county of a charge of hauling the same load, on the same wagon, over a turnpike in like condition in the latter county, because of the difference of conclusions of different judges and juries based upon their individual views of what should be the standard of comparison of tires, derived from their varying experiences, or the opinions of witnesses as to what difference of width of tires would constitute one wagon a narrow-tired wagon and another wagon a broad-tired wagon. If it should be said that the question as to what is a

narrow-tired wagon is one which may be determined in a particular case by the jury trying it, under proper instructions from the court, can we hold that the court in its instructions could lay down any principle or rule which would obtain in all such cases throughout the state? If so, can this court indicate what should be the scope or tenor of such instructions?

"The phrases 'narrow-tired wagon' and 'broad-tired wagon' are not technical phrases, having a peculiar and appropriate meaning in law, and they are to be taken in their plain or ordinary and usual sense. Thus taken, a 'narrow-tired wagon' means a wagon having wheels with tires which are narrow, while a 'broad-tired wagon' means a wagon having wheels with broad tires. If tires of particular widths be compared, it is easy to say which is comparatively narrow and which is comparatively broad, but without any prescribed standard it is impossible to say, as a matter of law, that a tire two inches wide is certainly either a narrow tire or a broad tire. Looking at the contents of the affidavit, and at the language of the statute under which it purports to proceed, we are unable to say that the facts stated in the affidavit certainly constitue a criminal offense."

The following cases announce the same doctrine:

Hayes v State, 75 S. E. 523;

Howard v State, 108 S. E. 513;

Griffin v State, 218 S. W. 494;

Russell v State, 228 S. W. 566;

State v International Railway, 165 S. W. 892;

State v Satterlee, 202 Pac. 636;
State v Lantz, 111 S. E. 766;
Tozier v United States, 52 Fed. 917.

It is our contention that this Court must hold that subdivision six cannot be literally interpreted without frustrating the purposes that Congress had in view in passing the Act. If the subdivision cannot be literally construed, we have assumed, as Judge Pollock did, that the reasonableness of the amount of decomposed matter must be read into the Act to establish a standard to determine the requisite extent of the adulteration, and if we do adopt the standard of reasonableness, then under the *Cohen Grocery Co. case* and other cases, it necessarily follows that such an interpretation would render the Act unconstitutional and void and no conviction thereunder can be sustained and no judgment of conviction can be upheld as the statute is penal in its nature.

But as was said in the case of *Cook v State*, 59 N. E. 489, nothing can be imported into a statute imposing fines or penalties.

No Standard Authorized.

There is no provision in any other section of the Food and Drugs Act authorizing the Depart-

ment of Agriculture or the Bureau of Chemistry to fix any standard for the determination of the extent of the adulteration under the provisions of subdivision six. Section three of the Act authorizes the Secretary of the Treasury, the Secretary of Agriculture and the Secretary of Commerce and Labor to make uniform rules and regulations for carrying out the provisions of the Act, including the collection and examination of specimens of food. Section four authorizes the Bureau of Chemistry to make examinations of specimens of foods for the purpose of determining from such examinations whether such articles are adulterated or misbranded within the meaning of the Act. It is questionable whether the Bureau of Chemistry or any of the Departments are empowered to fix a standard to determine the extent of adulteration which would prohibit the introduction of food products into commerce.

NO STANDARD FIXED BY BUREAU OF CHEMISTRY.

We have seen, however, that the Bureau of Chemistry has not adopted, or attempted to adopt any standard in relation to subdivision six, but if it be held that the Bureau of Chemistry has the power to adopt a standard for the en-

forcement of this subdivision, it is plain that it must have done so before this salmon was introduced into commerce. Statutes are not construed to operate retrospectively unless the language expressly so indicates. Plainly the Bureau would not have the power after the introduction of the salmon into commerce to adopt a standard to operate retrospectively.

What Sort of Instructions to a Jury Could Be Given.

If the Lower Court had submitted this case to the determination of the jury, we inquire what sort of instructions could the Court have given? He would have certainly been compelled to tell the jury that the Act could not be literally construed. The only other interpretation that he could have given would have been to have advised them as to the standard of reasonableness, which we have heretofore discussed. But such instructions would have been clearly in conflict with the decision of the Supreme Court in the *Cohen Grocery Company case* in its interpretation of the Lever Act. It would have been the duty of the Court to have interpreted to the jury the provisions of subdivision six. It is impossible to conceive how he would have done so. The jury could not

be permitted to adopt a standard and then find that such standard has been violated. The adoption of a test of comparison in a criminal statute or a statute imposing penalties is a legislative function, which under certain circumstances, we think may be delegated but this Act does not provide for such delegation to the Bureau of Chemistry to fix the standard, and even if it did the evidence is conclusive that no standard has ever been fixed by that Bureau.

For the reasons before presented, it is our contention that the decision of the Lower Court is correct and should be affirmed.

Judge Cushman's Decision.

The reasoning of the Lower Court, as set forth in its opinion (B. Ex. 76) construing certain other provisions of section seven of the Food and Drugs Act is unanswerable. Section seven provides:

"That for the purposes of this Act *an article* shall be deemed to be adulterated * * *

"Sixth. If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance, or any portion of an animal unfit for food, etc."

He says:

"I still adhere to the view that the 'article' of the statute is the single can of salmon, just as much so as if you had a herd of cattle, a part of which were tubercular and the rest were not; a single head of stock would be the article; we would not conclude that the entire herd of cattle were to be destroyed because ten per cent. or twenty per cent of them were tubercular. There you have means of testing the individual animal, but the great inconvenience that arises by reason of the nature of a can of salmon in testing it by any means known has brought about this attempt to fix a standard."

Again he says:

"This law directs that an article in whole or in part decomposed, putrid or—I have not the language before me, but the Court ruled that that does not apply; that it applies to bulk articles where there is a certain percentage of the entire mass that is putrid, but it does not apply to where a percentage of separate articles, such as cans of salmon, are part of them impure; that it does not give the Court any authority to destroy the good cans of salmon. Where an article in bulk, like liquid or a mass, is wholly impure, or partly impure, you can treat the whole of it as one thing, but you are not warranted, in law, in treating separate cans of salmon as one thing." (B. Ex. 80.)

Section seven uses the singular of the word "article." It does not say "articles of food" or "specimens of food" or "food products." The language used is plain and unambiguous. It re-

quires no construction or interpretation. Congress, in section seven, undertook to define adulterations for the purposes of the Act. Even though it might be conceded, which we do not concede, that other provisions of the Act might indicate that food products were intended, still the specific definition contained in section seven expressly states that that definition is to apply for all provisions of the Act. General provisions must always give way to specific provisions. Nothing can be imported into a statute imposing penalties or confiscating property. A penal statute must be construed strictly in favor of the accused. The purport of a statute can never be extended to make penal that which is not expressly set forth in the statute. Congress alone has the power to make an Act unlawful. To make an Act unlawful is a legislative function.

The Supreme Court of the United States in the case of *McDermott v Wisconsin* (228 U. S. 115, 33 Sup. Ct. Rep. 432) reached the same conclusion as did the Lower Court in construing the word "article" or "package" in section seven of the Food and Drugs Act, saying:

"That the word 'package' or its equivalent expression, as used by Congress in sections seven and eight in defining what shall constitute adul-

teration and what shall constitute misbranding within the meaning of the Act, clearly refers to the immediate container of the article which is intended for consumption by the public, there can be no question. And it is sufficient for the decision of these cases, that we consider the extent of the word "package" as thus used only, and we therefore have no occasion, and do not attempt to decide what Congress included in the terms 'original unbroken package' as used in the 2d and 10th sections, and 'unbroken package' in the 3d section. Within the limitations of its right to regulate interstate commerce, Congress manifestly is aiming *at the contents of the package as it shall reach the consumer, for whose protection the Act was primarily passed,* and it is the branding upon the package which contains the article intended for consumption itself which is the subject-matter of regulation. Limiting the requirements of the act as to adulteration and misbranding simply to the outside wrapping or box containing the packages intended to be purchased by the consumer, so that the importer, by removing and destroying such covering, could prevent the operation of the law on the imported article yet unsold, would render the act nugatory and its provisions wholly inadequate to accomplish the purposes for which it was passed.

"The object of the statute is to prevent the misuse of the facilities of interstate commerce in conveying to and placing before the consumer misbranded and adulterated articles of medicine or food, and in order that its protection may be afforded to those who are intended to receive its benefits, the brands regulated must be upon the packages intended to reach the purchaser. This is the only practical or sensible construction of the Act, and for the reasons we have stated, we think

the requirements of the Act as so construed clearly within the powers of Congress over the facilities of interstate commerce, and such has been the construction generally placed upon the Act by the Federal Courts."

This case strongly supports the view of the Lower Court as to the construction of the word "article" and should be controlling upon this Court. It also answers the contention of counsel for the Government in its references to sections 2, 3 and 10, as bearing upon the interpretation of the word "article" and shows the fallacy of such argument in contending that the word "article" should be construed in the generic sense and meaning "food products."

If the word "article" be construed to mean "food products" how should it be applied in the case of salmon? If the can is not the unit, what is the unit? Is it the case containing 48 cans, or is it the parcel, or is it the product or any particular cannery or of all the canneries owned by a packer? Many packers put up annually hundreds of thousands of cases of salmon. Is the whole product to be condemned and confiscated if a single can or case of salmon happens to be adulterated? Must a million cases of salmon be destroyed because ten per cent. or twenty per

cent. may inadvertently have decomposed or putrid matter in them, remembering always, that the tainted or putrid salmon is not injurious to health and bearing in mind further, as shown by the testimony in this case, that any person whose sense of smell is unimpaired can easily detect the odor and determine for himself whether the can is adulterated. Salmon is packed in Alaska and distributed throughout the United States and foreign countries. If one car is seized and found to be adulterated, will this justify the confiscation of other cars of salmon in which no decomposed matter exists? Yet if all of the salmon were shipped to Seattle or San Francisco in one parcel, the contention of counsel for the Government would justify the seizure of the entire output of any particular packer.

Moreover protection of the ultimate consumer is the real purpose of the Act and both upon reason and authority it would seem that the container that reaches the retail consumer is the thing that Congress had in mind in using the word "article."

Dr. Hunter testified that in his judgment 400 cases of the salmon involved in this controversy were adulterated but he said that the other re-

maining 1600 cases were marketable salmon and fit for human consumption. (B. Ex. 53.)

The Lower Court further stated that:

"The exigencies of the case, the danger to the public if the impure article is poisonous, might justify the banning of the entire number of articles and give reason and plausibility to a ruling that that was the intent of Congress. I conclude it does not warrant the court in concluding, in the absence of positive language leaving no room for doubt, that it was the intent to destroy sixteen hundred cases of good salmon out of a total of two thousand cases."

Evidently the fact that 1600 cases was admitted to be marketable salmon, free from adulteration, influenced the Lower Court in his decision, and he was further influenced by the fact that it was admitted by all of the witnesses for the Government that any inexperienced person could readily detect the putrid or tainted cans and of course would not eat the contents. In all packs of salmon occurs a small percentage of swelled cans due to the introduction of air into the can. The ends of the can puff out so that it is easy to detect them. We venture the assertion that no prosecution has ever been brought against a packer for introducing into commerce swelled cans. The reason is apparent—the consumer can detect

them and will avoid consuming them. Under the evidence in this case it is conclusively established by the Government's own witnesses that an ordinary housewife opening a can of tainted salmon could not help but detect its quality and therefore reject it.

In the case of *United States v 1379 Cases of Canned Salmon*, in the United States District Court for the Western District of Washington, Judge Cushman had occasion to pass upon the identical question involved in this case. In the course of his opinion he says:

"Now, that word 'article'—Judge Sessions found some trouble in construing 'consists of' or 'consists'—that word 'article,' I find fully as much trouble with as Judge Sessions did the other. Now, salmon is an article of food, but because some cans of salmon are found to be putrid, does not warrant the entire salmon output being condemned. A can of salmon is an article, but is the output of one cannery for a season an article, or is the shipload of salmon an article or half of the output of a cannery an article? I can't agree with any such construction. It would be reasonable to conclude, in the light or the purview of this Act—possibly you could construe the output of a cannery to be an article if the evidence showed that all of the output of the cannery was subjected to those conditions that rendered the part that you found to be putrid or filthy, but it seems like instead of this being in part putrid or filthy, that a part of it is putrid or filthy. If a very small percentage of the con-

tents of each can was filthy, even a very very small portion of it, that would condemn the whole lot, but because part of the cans are found to be filthy and putrid, I am unable to conclude that the court would be warranted in condemning the entire lot of these cases of salmon. Now, if Congress does intend that the courts should give that construction to this law, a definition would clear the matter up.

"Now, I find that instead of the entire output of this cannery having been subjected to conditions that caused this putrescence—this filth in certain of the cans—it is more reasonable to conclude that these old salmon that got into this pack were the salmon, as pointed out by the prosecutor, that they picked up locally when they were short of fish to complete the day's output or whatever reason there was, without knowing their age, and not those that Mr. Hansen went out to the fishing grounds and got from the purse seiners. That being true, why, the output of the cannery for those days on which they purchased these old fish would contain putrid fish. If you are going to construe 'article' as limited to the condition that created the putrescence, why, then you are going to limit it to those days and the output on those days when they did buy such fish, and not the whole season's pack. If the Department wants to make rules that these salmon canners shall can and keep their cans separate, and put one day's pack up separate from another, and not mix up the cans of the separate days' pack and thereby render—put themselves in the position to test and sample cases canned on a particular day when they might bring in a scowload of old fish, why, the public would be protected, and the commercial end of it would not be jeopardized by incurring the destruction of a large amount of fish that might

have been canned on days when they were getting perfectly fresh fish. I can see very readily how one scowload of fish if it was canned and thrown into a shipload and brought in from Bering Sea and samples were taken from that one scowload all canned on one day would show up a percentage high enough to condemn the whole shipload if we are going to adopt that rule and enforce it that the government seems to ask in this case." * * *

"Now this statute does not give the Court any warrant or does not give the Department, so far as I see, any warrant to fix a proper percentage of filth. It says 'in part.' One decision you read said that meant substantial part, and if it was where human excrement entered into oysters that I take must have been taken up from the mouth of a sewer some place, so small a percentage as could only be detected by a microscope, I believe would be a very substantial portion. But I don't find any warrant under a forfeiture—how would anyone instruct a jury where your articles, like cans of salmon, are separate? They are separate articles; the cases are separate.

"So far as health and comfort are concerned—that part of the law regarding misbranding is to prevent fraud being committed upon the consuming public—but the other part, keeping filth and putrescence out of it—that was not to prevent a fraud; that was to protect the public in the matter of its comfort if not health; and the more rotten the salmon was, the less liable you would be or the more liable you would be to be disgusted by it as a food, because you would be warned in the kitchen before you ever got it to the table; but a very small bit, the smaller the portion of putrescence, the more likely you would be to get it on your table."

Further in his opinion Judge Cushman said: (B. of Ex. 76.)

"I see no application either of the candy case or the syrup case or the oyster case to this. In the matter of the candy and in the matter of the syrup and in the matter of the oysters, there was a reasonable presumption of a fact or something in the nature of an issue of fact to submit to the jury. The jury might reasonably conclude that the oysters' feeding ground, where the oysters had been gathered, being, as I understand that case, the same feeding ground, that each oyster fed on substantially the same product, and in the samples of the oysters taken each of them showed some varying amount of impurity—the jury would certainly be justified in concluding that all the other oysters, not samples and not tested, would likewise contain a certain amount of impurity and render them unfit for food under this law. So in the case of the syrup, where it was labeled 'Maple' syrup, the cupidity of the manufacturer having induced him to label as maple syrup certain portions of a shipment that were not in fact maple syrup, the jury would be warranted in applying what they knew about human nature—the doctrine of, if false in one, false in all; that if the seller of the maple syrup was cheating and deceiving the public in the cans that were sampled, they would be justified in concluding that in the other cans so labelled but not sampled he was likewise cheating and defrauding the public by misbranding those. I am not entirely clear about the candy case, but I take it that that comes under the same rule."

This extract from Judge Cushman's opinion seems to distinguish the greater number of cases

cited by counsel for the Government upon the meaning of the word "article." The Court will remember that there is no evidence of any improper methods used in the packing of this salmon, nor in the manner of handling the fish or acquiring them. There is no evidence of any fraud on the part of the packer. There is no evidence that there was any willful mingling of partly decomposed fish with fresh fish, and neither is there any evidence of any fraudulent mingling by the packer of the defective cans with the balance of the parcel involved in this controversy.

On page 29 of the brief of plaintiff in error, it is said:

> "If the interpretation placed on the word 'article' by the court below in the case at bar is allowed to stand, it will necessitate a radical revision of the procedure under the Food and Drugs Act, procedure which has been in use throughout the various District Courts since the passage of that Act."

But this is no argument in support of counsel's construction of the statute. Under the Lever Act scores of prosecutions were enforced and convictions obtained by numerous Federal Courts. The fact that the Act had been erroneously interpreted by the Federal Courts had no influence upon the Supreme Court of the United States in holding the

law unconstitutional for the reason that the standard of reasonableness was incorporated in the Act and which was not a proper standard. The Supreme Court has, however, in the case of *McDermott v Wisconsin*, held that the can which is the article that reaches the consumer was what Congress intended by the passage of this Act. After the decision in the McDermott case it would seem that the Bureau of Chemistry should have modified its procedure to conform to the requirements of that decision. The inconvenience to the Bureau of Chemistry is certainly no reason for importing into a penal statute something that is not there. If it is the desire of Congress to give any other definition to the word "article" the Act can be easily amended.

On page 31 of the brief the contention is made that over 100 cans of the various samples examined were tainted and that as to these cans the Court should have submitted the case to the jury. Such a contention is absurd in view of the fact that the cans that were opened and found defective were immediately destroyed and could not be before the Court.

On page 33 of the brief, counsel says:

"In order for the Court to reach the deter-

mination that some 1600 cases of the parcel of salmon seized were unadulterated, it was obviously necessary to pass on a question of fact which was properly one for the jury. It was not admitted by the claimant that 400 cases of the product was bad, and it was not testified to by any of the Government's witnesses that 1600 cases of the product were unadulterated. The assumption on which the ruling was based could only be arrived at by a series of deductions which only a jury could rightfully make."

Dr. Hunter testified, as we have before stated, that 1600 cases of this salmon was marketable salmon and fit for human consumption. Counsel was therefore mistaken in saying that there was no evidence to support the finding of the Court. It was testified to by one witness for the Government and not denied by any of the others. Only one witness—Hansen —examined 384 cans, or 7 cases. The other witnesses examined 240 cans or 5 cases. It is therefore clearly established that not to exceed 7 cases were examined by any of the witnesses for the Government. Dr. Hunter's statement that 400 cases were bad was based upon the deduction that he drew from the examination of the 5 cases, but as a matter of fact, the record clearly shows that only one of the Government's witnesses examined 7 cases and the others only 5 and upon such examination and its results the

Government is seeking to destroy 1974 cases of salmon. The Court was well within the evidence in holding 1600 cases of the salmon to be marketable under Dr. Hunter's testimony. Under the facts in the case the uncontradicted testimony shows that the whole of the 1974 cases were sound with the exception of not to exceed 7 cases, which had already been destroyed.

On page 36 of counsel's brief, he refers to section 10, and particularly to the provision for the giving of a bond and the redelivery of the articles to the claimant conditioned that they shall not be sold or otherwise disposed of contrary to the provisions of the Act. In commenting upon this section, counsel says:

"It will be seen that ample provisions were made by Congress for just such a contingency as would have faced the Court below after a verdict. The seized goods could then have been taken down under bond for sorting or reconditioning, the burden remaining where it originally rested—with the claimant—to see that the goods were properly reconditioned and that they were not sold in violation of the terms of the Food and Drugs Act."

There is nothing in section 10 that authorizes the reconditioning or sorting of the salmon and we fail to see how this provision aids counsel in support of his contention. There is no evidence

that the claimant in this case, in any event was able financially to furnish a bond in compliance with the provisions of the Act. Moreover, the statute makes it optional with the claimant whether the bond shall be given. His property ought not to be confiscated merely because he might have a remedy by putting up a bond and reconditioning the goods.

On page 37 of the brief of the plaintiff in error, counsel says:

"It is also a well established rule that where one fraudulently, wilfully or wrongly intermingles his goods with those of another so that there is no evidence to distinguish the goods of the one from those of the other, the wrong-doer forfeits all of his interest in the mixture to the other."

This record fails to show any fraudulent, willful or wrongful intermingling of adulterated cans with the good cans. No evidence was offered as to any improper methods either in the packing of the salmon or in the procuring of the fish that were canned. Fraud can never be presumed. It must be established by competent evidence. There is no presumption of fraud. It must be proven. This record wholly fails to show any fraud on the part of the packer or the claimant. The salmon were packed by the Alaska Herring & Sardine Co.

and purchased by A. O. Andersen & Co. It is ridiculous to contend that A. O. Andersen & Co. could be guilty of any fraud in intermingling the goods. It is inconceivable that the claimant would have purchased adulterated goods if it had known it, nor is there any evidence in the record to show that the 7 cases of salmon examined became a part of the pack of the cannery in any other than an innocent and inadvertent way. The salmon that supply the canneries are to a considerable extent purchased from fishermen. It is impossible for anyone to determine, we assume, how long a salmon has been out of the water. The packers we understand, usually endeavor to pack the salmon within forty-eight hours after they are caught. It is conceivable that the packer was misled as to the time that the fish had been out of the water. Counsel cite in support of their contention the case of *Hentz v The Idaho*, 93 U. S. 586. In that opinion the Court says:

"It is admitted the general rule that governs cases of intermixture of property has many exceptions. It applies in no case where the goods intermingled remain capable of identification, nor where they are of the same quality or value; as where guineas are mingled, or grain of the same quality. Nor does the rule apply where the *intermixture is accidental, or even intentional, if it be not wrongful.* But all the authorities agree that

if a man wilfully and wrongfully mixes his own goods with those of another owner, so as to render them undistinguishable, he will not be entitlted to his proportion or any part of the property. Certainly not, unless the goods of both owners are of the same quality and value. Such intermixture is a fraud. And so, if the wrong-doer confounds his own goods with goods which he suspects may belong to another, and does this with intent to mislead or deceive that other, and embarrass him in obtaining his right, the effect must be the same."

In the absence of proof of fraudulent intermingling of adulterated cans with good salmon, the presumption that such intermingling was accidental must prevail.

On page 39 of counsel's brief it is stated:

"The Food and Drugs Act when read as a whole, also supplies a convincing argument against the court's ruling. Section 2 plainly prohibits the introduction into any state from any other state any article of food which is adulterated and stamps the act of shipping or delivery for shipment from one state to another as a misdemeanor. It could not be said that the shipper in the present case had not shipped adulterated canned salmon and it is the theory of the Government that the Act, in section 10, provides an alternate method of procedure based on the same violation of the Act as that described in section 2. Is it logical to say, in view of the plain violation of section 2, that the same goods when attacked under the provisions of section 10, are not liable to condemnation and forfeiture?"

The answer to this argument is perfectly apparent. Only 7 cases of salmon or 384 cans were examined and found defective. Common experience and the record both disclose that the cans that were examined were destroyed. How could the cans that have been destroyed be confiscated by the judgment of the Court? They were already destroyed. This is not a proceeding against the shipper for the introduction of the salmon. This is an action *in rem.* That would be a criminal action against the shipper, which is totally foreign to the issues involved in this case.

On page 40 of the brief of plaintiff in error, it is stated:

"A construction should not be applied to a statute which renders it inoperative and which negatives the avowed purposes of the Act."

Under counsel's contention it would be the duty of the courts to uphold all acts of Congress whether or not such acts contravene any constitutional provision. It is usually possible to ascertain from the reading of a statute its purposes. Under counsel's statement, it would be the duty of the Court to uphold the Act even though it was unconstitutional.

It was easy to ascertain the purpose of the Lever Act. Yet the Supreme Court, in the *Cohen Grocery Company case*, unhesitatingly held it void. If subdivision six of section 7, as construed by the Bureau of Chemistry, deprives the claimant of any of his constitutional rights we think it would be the duty of the Court to unhesitatingly set it aside. This is true, particularly of a statute imposing penalties. As we have seen, nothing can be imported into the Act to establish a crime or to sustain a conviction that is not inherent in the Act itself.

We have referred specifically to only a few of the contentions of counsel for the Government set forth in his brief but in our main argument we think that we have sufficiently answered such contentions. We earnestly contend that the judgment of the Lower Court is correct and should be affirmed.

Respectfully submitted,

OTTO B. RUPP, AND
KERR, MCCORD & IVEY,
Attorneys for Defendant in Error.

No. 3900

United States

Circuit Court of Appeals

For the Ninth Circuit.

ELI ROUSSEAU,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration for the District of Washington,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3900

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Transcript of Record.

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Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Counsel.

Messrs. POE & FALKNOR, Attorneys for Petitioner and Appellant,
405 New York Building, Seattle, Washington.

THOMAS P. REVELLE, Esq., United States Attorney, Attorney for Appellee,
310 Federal Building, Seattle, Washington.

JOHN A. FRATER, Esq., Assistant United States Attorney, Attorney for Appellee,
310 Federal Building, Seattle, Washington.

[1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6699.

Petition for Writ of Habeas Corpus.

In the Matter of the Application of ELI ROUSSEAU for a Writ of Habeas Corpus.

To the Honorable Judge of the Above-entitled Court:

Your petitioner, Eli Rousseau, respectfully shows and represents to this Honorable Court:

I.

That he is unlawfully and unjustly detained by Luther Weedin, United States Commissioner of Immigration of the Port of Seattle, at the immigra-

*Page-number appearing at foot of page of original certified Transcript of Record.

tion detention station at Seattle, Washington, under and by virtue of a warrant issued by the Secretary of Labor directed to the said commissioner to deport your petitioner to Canada. That your petitioner has exhausted his appeal from said order of deportation.

II.

That your petitioner is held for deportation under the United States immigration laws on the following grounds:

(a) That he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his last entry to the United States.

(b) That he has been found connected with the management of a house of prostitution or other place habitually frequented by prostitutes, or where prostitutes gather.

(c) That he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute. [2]

(d) That he was a person likely to become a public charge at the time of his entry.

That there is no evidence whatsoever contained in the record of the hearing given your petitioner to substantiate or support a deportation on the above-named grounds.

III.

Your petitioner further alleges that the hearing given him by the immigration authorities to determine whether he was liable to deportation was unfair, and unjust in that at the time of said hear-

ing your petitioner was confined in the Washington State Penitentiary at Walla Walla, and was at said time and place unable to obtain advice or to procure counsel; and in this, that your petitioner was unfairly and unjustly charged at said hearing with breaches of the immigration act which were not contained in the warrant of arrest; and in this, that your petitioner was given no chance or opportunity at said hearing to explain his testimony or give additional information that would have cleared him of the charges made against him, and in this; that evidence which was hearsay and which was incompetent, irrelevant, and immaterial, and which was highly prejudicial to your petitioner, was formally introduced at said hearing and made a part of the record thereof.

IV.

Your petitioner further alleges that he is a native of Canada, of the age of seventy-two years; that he came to the United States from Canada when he was eight years old and has since then continuously made the United States his home; that at the age of about fifteen years [3] while employed in the mines at Marquette, Michigan, he made application for citizenship; that your petitioner came to the State of Washington in 1883; that since then your petitioner made the state of Washington his home and has never since given up said State as his residence and domicile; that your petitioner has since the first entry into the State of Washington voted continuously in said state with the exception of the last eight years of his residence therein, and has held

public office therein; that he has always been informed that he was and believed himself to be a citizen of the United States.

V.

That on the —— day of ——, 19—, your petitioner was convicted in the Superior Court of the State of Washington, in and for Snohomish County, of the crime of being a jointist, and that said crime is not a crime involving moral turpitude; that pending an appeal from said conviction your petitioner, who was at the time on bail, went to Vermont and then to Massachusetts and New York for the purpose of visiting relatives in those states; that while so visiting your petitioner was informed by his attorney that his appeal had been lost in the Supreme Court of the State of Washington, and your petitioner immediately thereupon returned to Everett, Washington, via the Canadian Pacific Railroad through Canada to meet his sentence; that your petitioner entered the United States through Plaine, Washington, on so returning and at said time and place informed the immigration officials in answer to their inquiries that he was a citizen of the United States as he well and truly believed himself to be; that your petitioner [4] at the time he left the eastern part of the United States as aforesaid, to fulfill the obligations of his bond, as aforesaid, had as his destination Everett, Washington, and travelled through Canada merely as the quickest and most efficient way of reaching his destination; and that such an entrance into the United States was not an "entry" in contemplation

of the immigration laws; that your petitioner thereupon was taken to the Washington State penitentiary at Walla Walla where he served the sentence imposed upon him for his aforesaid conviction.

VI.

That the said Luther Weedin, United States Commissioner of Immigration at Seattle, Washington, is threatening to and will deport your petitioner to Canada on the 20th day of April, 1922, unless a writ of habeas corpus is caused to be issued herein, requiring the said United States Commissioner to deliver up your petitioner to await the further order of this court.

WHEREFORE, your petitioner prays: That a writ of habeas corpus issue out of the above-entitled Commissioner of Immigration at Seattle, Wash-commissioner of Immigration at Seattle, Washington, to the end that your petitioner may be discharged from said illegal restraint and unlawful arrest;

(2) That pending a hearing upon an application for said writ of habeas corpus, that the said Luther Weedin, United States Commissioner of Immigration, at Seattle, Washington, and his deputies, be hereby enjoined and restrained from deporting your petitioner from Seattle to the Dominion of Canada; [5]

(3) That an order to show cause issue forthwith directed to the said Luther Weedin, United States Commissioner of Immigration, at Seattle, Washington, requiring him to be and appear in the above-entitled court, at a time to be fixed by

this honorable court to show cause, if any he may have, why said writ of habeas corpus may not be granted.

POE and FALKNOR,
Attorneys for Petitioner.

Office & P. O. Address:
405 New York Block,
Seattle, Washington.

State of Washington,
County of King,—ss.

Eli Rousseau, being first duly sworn on oath deposes and says:

That he is the petitioner named in the above-entitled cause, that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

ELI ROUSSEAU.

Subscribed and sworn to before me this 20th day of April, 1922.

[Notarial Seal] DeWOLFE EMERY,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 20, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU for a Writ of Habeas Corpus.

Order to Show Cause.

This matter having come on regularly in its order to be heard on the application of the petitioner Eli Rousseau for the issuance of a Writ of Habeas Corpus herein, and,

It appearing from said petition that the said Eli Rousseau is illegally held under color of authority of the Federal government by Luther Weedin, United States Commissioner of Immigration at Seattle, Washington, and said petitioner having prayed that a restraining order issue herein directed to the said commissioner of immigration restraining him and his deputies from deporting the said petitioner until further order of this court;

NOW THEREFORE, it is hereby ordered that Luther Weedin, the United States Commissioner of Immigration, at Seattle, Washington, and his deputies be and they are hereby restrained from deporting the said Eli Rousseau to the Dominion of Canada until further order of this court and,

It is further ordered that the said commissioner be and he is hereby required to appear in the District Court of the United States for the Western District of Washington, Northern Division, on the

24th day of April, 1922, at 10:00 o'clock A. M., and show cause why a writ of habeas corpus shall not issue herein.

Done in open court this 20th day of April, 1922.

JEREMIAH NETERER,
Judge. [7]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 20, 1922. F. M. Harshberger Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of Washington, Northern Division.
May, 1922, Term.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU for a Writ of Habeas Corpus.

Return to Order to Show Cause

To the Honorable JEREMIAH NETERER, Judge of the above-entitled court:

Now comes the respondent, Luther Weedin, United States Commissioner of Immigration for the District of Washington, with his office at the port of Seattle, Washington, and for answer and return to the order to show cause herein requiring the said respondent to show cause why a writ of habeas corpus should not be granted herein, says that he here produces the body of Eli Rousseau, the person

named in the petition for said writ and said order, in obedience to the command and direction of the said order to show cause;

And for further answer and return to said order avers that he is detaining in his custody the said Eli Rousseau for deportation from the United States as an alien Canadian person not entitled to admission under the laws of the United States and subject to deportation under the laws of the United States, the said Eli Rousseau having been heretofore arrested and detained by this respondent under a warrant of arrest issued by the Assistant Secretary of Labor of the United States, and thereafter having been ordered deported by said Assistant Secretary of Labor; said order for deportation being in the form of a warrant of deportation dated February 15th, 1921, said warrant of deportation being in the words and figures following, to wit: [9]

Warrant—Deportation of Alien.

UNITED STATES OF AMERICA.

Department of Labor.

Washington.

No. 54904/165. Incl. 6727

To JOHN H. CLARK, U. S. Commissioner of Immigration, Montreal, Canada.

WHEREAS, from proofs sumbitted to me, after due hearing before immigrant inspector McKendree C. Faris, held at Walla Walla, Wash., I have become satisfied that the alien ELI or JOSEPH

ROUSSEAU, who landed at the port of Blaine, Wash., on the 12th day of October, 1920, has been found in the United States in violation of the immigration act of February 5, 1917, to wit:

That he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he has been found connected with the management of a house of prostitution or other place habitually frequented by prostitutes, or where prostitutes gather; that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; and that he was a person likely to become a public charge at the time of his entry, and may be deported in accordance therewith:

I, LOUIS F. POST, Assistant Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to return the said alien to Canada, the country whence he came, at the expense of the appropriation: "Expenses of Regulating Immigration, 1921."

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 15th day of February, 1921.

LOUIS F. POST,
Assistant Secretary of Labor.

said order to this respondent being in the form of a letter from the Assistant Commissioner General, approved by the Assistant Secretary of Labor, in the words and figures following, to wit: [10]

U. S. DEPARTMENT OF LABOR.
Bureau of Immigration,
Washington, D. C.

No. 54904/165 February 15, 1921.

Commissioner of Immigration,
Seattle, Wash.

Sir:

The Bureau acknowledges the receipt of your letter of Jan. 13th, No. 37012/739. transmitting record of hearing accorded the alien ELI or JOSEPH ROUSSEAU, who entered at the port of Blaine, Wash., on October 12, 1920.

After a careful examination of the evidence submitted in this case, the Department is of opinion that the alien is in the United States in violation of law. You are therefore directed to cause him to be taken into custody and conveyed to such point in Canada as the U. S. Commissioner of Immigration, Montreal, Canada, may designate, the expenses incident to such conveyance, including the employment of an attendant to assist in delivery, if necessary, at a nominal compensation of $1.00 and expenses both ways, being authorized, payable from the appropriation "Expenses of Regulating Immigration, 1921."

Execution of the warrant of deportation should be deferred until the alien is released from prison by the proper authorities.

Respectfully,
ALFRED HAMPTON,
Assistant Commissioner General.

Approved:
LOUIS F. POST,
Assistant Secretary.
Inclose W. D. No. 6727.
RN.

Respondent hereto attaches the original record, order, decision and exhibits, both on the hearing before the Immigrant Inspector, at Walla Walla, Washington, and the record of the submission of said hearing to the Secretary of Labor, which papers are hereby made a part and parcel of this return the same as if copied herein in full. [11]

WHEREFORE respondent prays that said writ of habeas corpus be denied.

LUTHER WEEDIN,
United States Commissioner of Immigration.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on his oath deposes and says: That he is United States Commissioner of Immigration, named in the foregoing return; that he has read the said return and knows the contents thereof, and that he believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 19th day of May, 1922.

[Notarial Seal] D. L. YOUNG,
Notary Public.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 22, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [12]

In the United States District Court for the Western District of Washington, Northern Division.

No. 6699.

In Re Application of ELI ROUSSEAU, for a Writ of Habeas Corpus.

Decision.

Filed May 25, 1922.

The petitioner was born in Saint Reni, Province of La Prarie, Quebec Canada; is French, he came to Washington Territory about forty years ago, settled in Snohomish County, assumed he was a citizen and voted before the Territory was admitted as a state, and after admission until ten or twelve years ago, when his naturalization papers were examined, and he was unable to produce them. He came with his Uncle when he was nine years of age to Massachusetts, and has lived in the United States practically all the time since. He was convicted in the State Court of being a "Joinist" and was sentenced to the penitentiary at hard labor from one to five years. He appealed to the Supreme Court of the State, pending a hearing he was released on bond, and while so released visited the home of his birth for a brief period. The judgment was af-

firmed and upon being advised he returned to the United States, and entered upon the service of his sentence. Returning he entered at the Port of Blaine reporting to the proper officers, and claiming that he was a citizen. A Warrant of arrest was issued charging the petitioner with entering the United States without inspection, and at the time of his entry was a person likely to become a public charge, and that he has been convicted of a crime involving moral turpitude prior to his entry. After a summary hearing he was ordered deported, and a warrant of deportation issued February 15, 1921. The warrant of deportation reciting

> "That he has been convicted of, and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he has been found connected with the management of a house of prostitution, of other places habitually frequented by prostitutes, or where prostitution gather; that he has been found receiving, sharing [13] in, or deriving benefit from the earnings of a prostitute; and that he was a person likely to become a public charge at the time of his entry."

At the time of the summary hearing the petitioner was without counsel. He was advised that he had a right to counsel, but declined it. During the examination the examination inspector preferred a number of additional charges, and following each charge asked the petitioner whether he desired counsel. There was also submitted an affidavit from

one Carrie Scott Karris against the petitioner, and a letter written to the Acting Commissioner with relation to conduct of petitioner. The petitioner claims that he was denied a fair trial, and that there is no testimony to warrant his deportation.

THOMAS P. REVELLE, U. S. Attorney, and JOHN FRATER, Ass't U. S. Attorney, Attorneys for the United States.

POE & FALKNOR, Attorneys for the Petitioner.

NETERER, D. J.—All of the grounds set forth in the warrant of deportation, except the first, may be disregarded. The testimony shows that the petitioner has property in Mukilteo worth $10,000. He was therefore not likely to become a public charge, which means, one likely to be an occupant of an alms house for want of means of support, Gegiow v. Uhl, 239 U. S. 60; or likely to be sent to an alms house and supported at public expense, ex parte Mitchell, 256 Fed. 229. Howe v. Ex Rel Savitsky, 247 Fed. 292; NG Fung He v. White, Immigration Com'r, 266 Fed. 765. Any testimony relating to the other grounds of deportation show such act, if any, to have taken place long prior to his entry to the United States, in October 1920. The petitioner strongly emphasizes the fact that being convicted of a "joinist" is not such a crime as is denounced by the Immigration Act. The language of the act is: [14]

> "Persons who have been convicted, or have admitted having committed a felony or other crime or misdemeanor moral turpitude."

"Turpitude," is defined, Bouvier, "Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude;" "Moral," Webster, "The doctrine or practice of the duties of life pertaining to those intentions and actions of which right and wrong, virtue and vice, are predicated, or to the rules by which such intentions and action ought to be directed; relating to the practice, manners, or conduct of men as social beings in relation to each other, as respects right and wrong, so far as they are properly subject to rules." Moral Turpitude, has been defined as an act of baseness, vileness, or depravity in private and social duties which man owes his fellow men, or to society in general, contrary to the acts and customary rules of right and duties between man and man. Vol. 5, Words & Phrases, p. 4580. Moral Turpitude, is "depravity in the private social duties which a man owes to his fellow man or to society in general. An act contrary to the accepted and customary rules of right and duty between man and man." 20 Am. & Eng. Ency of Law, p. 872. A "Joinist" is described by Sec. 11, Laws of Wash. 1917, p. 60 being the "Liquor" statute of Washington, as a person who conducts any place for the unlawful sale of intoxicating liquor; and on conviction is deemed guilty of a felony and punished by imprisonment not less than one or more than five years. A felony under the Federal laws is an offense which may be punished by death or imprisonment for a term exceeding one year, Sec. 335 Penal Code. It would seem that the laws of Wash-

ington, *supra,* establish a rule of right and fix a duty between man and man, and being a "joinist" transgresses this established rule of the state, and a violation of this rule is, by statute, made a felony punishable by confinement in the State Penal Institution. The Immigration [15] act, *supra,* however, makes a conviction of felony cause of exclusion.

The practice of preferring a number of charges against an individual by an examining inspector during a summary hearing is one that should be discouraged. It is not in harmony with the thought of fair dealing, as also the admissions and consideration of *ex parte* affidavits and letters, depriving the accused the privilege of cross-examining. The affidavit and letter cannot in any sense have relation to the conclusion here reached, or any bearing upon it, and hence do not in this case derogate against a fair trial upon the charge of conviction of a felony.

The writ is denied.

NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 25, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy Clerk. [16]

United States District Court, Western District of Washington, Northern Division.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU for a Writ of Habeas Corpus.

Order Denying Petition for Writ of Habeas Corpus.

This matter having come on for hearing on the order to show cause on the 22d day of May, 1922, and on May 26th, 1922, this court rendered an opinion denying the writ in the above-entitled cause, and it appearing to the court from the files and records herein that the petitioner has had a fair hearing by the Department of Immigration on the matter of deportation,

IT IS HEREBY ORDERED that petition for writ of habeas corpus be, and the same is hereby, denied.

Dated this 3d day of July, 1922.

JEREMIAH NETERER,
United States District Judge.

O. K. as to form,

POE and FALKNOR.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 3, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [17]

United States District Court, Western District of Washington, Northern Division.
May, 1922, Term.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU for a Writ of Habeas Corpus.

Notice of Appeal and Petition for Allowance Therefor.

The above-named petitioner, Eli Rousseau, conceiving himself aggrieved by the order and decree made and entered herein on the 3d day of July, 1922, dismissing the petition for a writ of habeas corpus hereinbefore filed, and declaring that the petitioner has had a fair hearing by the Department of Immigration on the matter of his deportation, DOES HEREBY APPEAL from said order and decree to the United States Circuit Court of Appeals, 9th Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays this appeal may be allowed and that a transcript of the record proceedings and papers upon which the order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Circuit.

POE and FALKNOR,
Attorneys for Petitioner.

Office & P. O. Address:
405 New York Building,
Seattle, Washington.

Received a copy of the within notice this 3d day of July, 1922.

THOS. P. REVELLE,
Attorney for United States,
By E. D. D.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 3, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.
May, 1922, TERM.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU for a Writ of Habeas Corpus.

Assignment of Errors

Comes now Eli Rousseau, the above-named petitioner, and makes and specifies an assignment of errors to be relied upon by him on his Appeal herein;

I.

The Court erred in dismissing the petition for a Writ of Habeas Corpus.

II.

The Court erred in holding that petitioner was not deprived of a fair hearing by reason of the fact that he was confined in the Washington State Penitentiary at the time of such hearing.

III.

The Court erred in holding that petitioner was not deprived of a fair hearing by reason of the fact that the examining inspector preferred charges at said hearing which were not contained in the warrant of arrest.

IV.

The Court erred in holding that petitioner was not deprived of a fair hearing by reason of the consideration of *ex parte* affidavits and letters as a part of the evidence submitted at said hearing; and by reason of the fact that no opportunity was given petitioner at said hearing to offer testimony explanatory to that elicited from him by the examining inspector. [19]

V.

The Court erred in holding that petitioner had been convicted of a crime involving moral turpitude prior to his entry to the United States on October 12, 1920.

VI.

The evidence is insufficient to sustain the final order and judgment of deportation entered herein on the —— day of July, 1922.

VII.

For other errors appearing upon the record.

For the above foregoing errors apparent on the face of the record petitioner prays that the order and decree herein rendered be reversed and that the decree and order of the United States District Court in and for the Western District of Washington, Northern Division, be set aside and that there

be judgment allowing the Writ of Habeas Corpus.

POE and FALKNOR,
Attorneys for Petitioner.

Office and Postoffice Address:
405 New York Building,
Seattle, Washington.

Received a copy of the within assignment this 3d day of July, 1922.

THOS. P. REVELLE,
Attorney for U. S. by E. D. Dutton.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division, July 3, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

United States District Court, Western District of Washington, Northern Division.

May, 1922, Term.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU, for a Writ of Habeas Corpus.

Order Allowing Appeal.

Eli Rosseau, the petitioner herein, by his counsel having presented a petition for an appeal herein together with an Assignment of Errors.

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal be allowed as prayed for.

IT IS FURTHER ORDERED that said Peti-

tioner be *enlerged* upon executing a recognizance with sureties in the sum of five hundred dollars to the satisfaction of the Clerk of this Court, conditioned for his appearance to enter the Judgment of the Circuit Court of Appeals.

Done in open Court this 3d day of July, 1922.

JEREMIAH NETERER,
Judge.

Received a copy of the within order this 3d day of July, 1922.

THOS. P. REVELLE,
Attorney for United States.
E. D. Dutton.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 3, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

United States District Court, Western District of Washington, Northern Division.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU, for a Writ of Habeas Corpus.

Order Directing Transmission of Original Files to Circuit Court of Appeals, Ninth Circuit.

Upon motion of the attorneys for Eli Rousseau the petitioner above named, consented to by the attorneys for Luther Weedin, the Respondent

herein, and it appearing to the court that there were filed as a part of the pleadings in this cause, to wit; as a part of the return of the respondent to the writ of habeas corpus issued herein, one certain file containing the original documents, correspondence, orders, and other papers constituting the official files of the Department of Labor in the matter of the deportation proceedings before the Department of Labor in the cause of the above-named petitioner, and it further appearing to the Court that it is proper that such original files be sent up on appeal as part of the record and proceedings on appeal for inspection and consideration by the Circuit Court of Appeals, and the Court being further of the opinion that the expense of printing said files in the transcript of record is not necessary to the proper consideration of the appeal or justified by the exigencies of the cause,

IT IS ORDERED that the Clerk of this court be and he is hereby directed to transmit the aforesaid original files to the Circuit Court of Appeals, Ninth Circuit, to be considered by said Court of appeals as a part of the record in this cause, but not to be printed. [22]

DONE in open court this 8th day of July, 1922.

JEREMIAH NETERER,

Judge.

The entry of the foregoing order and the sending up to the Circuit Court of Appeals as a part of

the record in this cause of the files in said order mentioned are in all respects duly approved.

THOS. P. REVELLE
U. S. Atty.,
And JOHN A. FRATER,
Asst. U. S. Atty.,
Attorneys for Respondent Luther Weedin.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 10, 1922. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU, for a Writ of Habeas Corpus.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled court:

You will please prepare typewritten transcripts of record in the above-entitled cause on appeal and file the same in the United States Circuit Court of Appeals for the Ninth Circuit, the said record to comprise the following papers:

(1) Petition of applicant for writ of habeas corpus.
(2) Order to show cause thereon.
(3) Return of order to show cause.
(4) Decision of the court.

(5) Order denying petition for writ of habeas corpus.
(6) Notice of appeal, and petition for allowance thereof.
(7) Assignment of errors.
(8) Order allowing appeal.
(9) Citation.
(10) Order directing the sending up of Department of Labor's files as a part of the record.
(11) This praecipe.

Dated this 3d day of July, 1922.

POE and FALKNOR,
Attorneys for Petitioner.

I hereby acknowledge service of copy of the foregoing praecipe waiving the right to request the insertion of any other matters than those incorporated in the foregoing praecipe and stipulating that the proceedings, papers and orders and documents included in said praecipe constitute a full and sufficient record upon appeal.

THOS. P. REVELLE and
JOHN A. FRATER.
Attorneys for Respondent,
Luther Weedin. [24]

United States District Court, Western District of Washington, Northern Division.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU, for a Writ of Habeas Corpus.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washington, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 24, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein from the judgment of the said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred, and paid in my office by or on behalf of the petitioner and appellant herein, for making record, certificate or return to the United

States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause to wit: [25]

Clerk's fee (sec. 828, R. S. U. S.), for making record, certificate or return 56 folios at 15c 8.40

Certificate of Clerk to Transcript of Record 4 folios at 15c ..... .60

Seal to said Certificate ..... .20

Certificate of Clerk to Department of Labor Files 2 folios at 15c ..... .30

Seal to said Certificate ..... .20

I hereby certify that the above cost for preparing and certifying record amounting to $9.70, has been paid to me by attorneys for petitioner and appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

IN WITNESS WHEREOF, I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 24th day of July, 1922.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court. [26]

United States District Court, Western District of Washington, Northern Division.

May, 1922, Term.

No. 6699.

In the Matter of the Application of ELI ROUSSEAU, for a Writ of Habeas Corpus.

Citation on Appeal.

The President of the United States to Luther Weedin, Commissioner of Immigration, Respondent herein, and to Thomas P. Revell, United States Attorney, and John Frater, Assistant United States Attorney, Attorneys for said Respondent, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the 9th Circuit to be held in the city of San Francisco in the state of California, within thirty days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Eli Rousseau, is petitioner, and Luther Weedin, United States Commissioner of Immigration for the District of Washington is respondent, to show cause, if any there may be, why the Judgment in such Appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

WITNESS the Honorable JEREMIAH NETERER, Judge of the United States District Court in and for the Western District of Washington, Northern Division, this 3d day of July, 1922.

JEREMIAH NETERER,
Judge.

Service of the within citation and receipt thereof admitted this 3d day of July, 1922.

THOS. P. REVELLE,
Attorneys for Respondent,
Luther Weedin.

C. PHILBROOK,
Clerk. [27]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. July 3, 1922. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: No. 3900. United States Circuit Court of Appeals for the Ninth Circuit. Eli Rousseau, Appellant, vs. Luther Weedin, as Commissioner of Immigration for the District of Washington, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed July 27, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals

For the Ninth Circuit

ELI ROUSSEAU,
Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration for the District of Washington,
Appellee.

No. 3900.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief of Appellant

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United States Circuit Court of Appeals

For the Ninth Circuit

ELI ROUSSEAU,
Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration for the District of Washington,
Appellee.

No. 3900.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief of Appellant

STATEMENT OF CASE

This matter is before the court on an appeal from a decision rendered in the United States Dis-

trict Court for the Western Division of Washington, Northern Division, denying the petition of appellant for a writ of Hebeas Corpus.

The appellant is 72 years of age and was born in St. Reni, Canada. He came to the United States when he was nine years of age (p. 3 Dept. of Labor Files) and has lived in the State of Washington since 1883, making his home first in Everett, and then in Mukilteo, (pp. 4-5 Dept. of Labor Files). He voted in this state when it was a territory.

In July, 1919, appellant was charged by information in the State of Washington with the crime of being a "Jointist" and was thereafter accorded a trial and convicted of said charge. Pending appeal to the Supreme Court of the State of Washington he visited relatives in the East and in Canada. When the appellant learned that the judgment of conviction had been affirmed, though without the jurisdiction of the United States, he voluntarily entered the United States through Blaine, Washington, on October 12, 1920, to meet his sentence of from one to five years in the State penitentiary at Walla Walla. He immediately began to serve this sentence.

On December 3, 1920, a Department of Labor warrant for appellant's arrest was issued under the

hand of the acting Secretary of Labor. The material portions of said warrant follow (see Dept. of Labor Files):

"To

HENRY M. WHITE, Commissioner of Immigration, Seattle, Wash.,

Or to any immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien JOSEPH ROUSSEAU who landed at the port of Blaine, Wash., on_____the 12th day of Oct., 1920, has been found in the United States in violation of the immigration act of February 5, 1917, for the following among other reasons:

That he was a person likely to become a public charge at the time of his entry; and that he entered without inspection.

I, ROWLAND B. MAHANY, Acting Secretary of Labor, by virtue of the power and authority vested in me by the laws of the United States, do hereby command you to take into custody the said ailen and grant him a hearing _ _ _ _ to enable him to show cause why he should not be deported in conformity with law."

Appellant's hearing took place on January 3, 1921, at the Washington State Penitentiary at Walla Walla; the examination was conducted by a United States Immigrant Inspector in the presence of a hired stenographer (See report of Hearing, Dept. of La-

bor Files). The testimony given therein will be referred to in more detail later. Thereafter the Report of Hearing was submitted to the Department of Labor and on the 15th of February, 1921, a Department warrant was issued for appellant's deportation to Canada for the reason that he had "been found in the United States in violation of the Immigration Act of Feb. 5, 1917," to-wit: "That he has been convicted of and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he has been found connected with the management of a house of prostitution or other place habitually frequented by prostitutes, or where prostitutes gather; that he has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute; and that he was a person likely to become a public charge at the time of his entry, and may be deported in accordance therewith." (Tr. p. 9).

The execution of the warrant of deportation was ordered deferred until appellant was released from prison. (Tr. p. 11). On completion of his penitentiary sentence appellant was taken into custody under and by virtue of said warrant and held for deportation. Whereupon appellant sued out this petition for a writ of Habeas Corpus. In answer there-

to a return was made by the appellee which incorporated the Department of Labor files. (Tr. p. 8). A hearing was thereafter had on the issues thus formed and on the 25th day of May, 1922, the District Court filed its decision herein denying said petition (Tr. p. 13) and thereafter on the 3rd day of July, 1922, a formal order was entered denying the petition for writ of Habeas Corpus. (Tr. p. 18). On that date appellant petitioned the District Court for leave to appeal (Tr. p. 19) and said petition was duly granted. (Tr. p. 22).

❖ ❖ ❖

ASSIGNMENTS OF ERROR

I

The court erred in dismissing the petition for the Writ of Habeas Corpus.

II

The court erred in holding that appellant was not deprived of a fair hearing by reason of the fact that he was confined in the State penitentiary at the time of said hearing.

III

The court erred in holding that petitioner was not deprived of a fair hearing by reason of the fact

that the examining inspector preferred additional charges at said hearing not contained in the warrant of arrest.

IV

The court erred in holding that petitioner was not deprived of a fair hearing by reason of consideration of a certain ex parte affidavit and letter as a part of the evidence submitted at said hearing, the documents referred to being (1) the affidavit of Carri Scott Karris, marked Exhibit "C" and attached to Dept. of Labor files, in words and figures as follows:

"STATE OF WASHINGTON } SS
COUNTY OF SNOHOMISH }

CARRI SCOTT KARRIS, being first duly sworn on oath deposes and says: That my name is Carri Scott Karris; that I was housekeeper for Joe Rousseau at his place at Mukilteo from about the middle of November, 1918, until about the first of April, 1919; said Rousseau, last fall and winter, made cider from apples on his place and sold it to guests whom he entertained at his said home; that a great many people came there as guests of the place, and he served them with hard cider and he also had moonshine whiskey and also red whiskey; I think he also had some bonded whiskey. He would serve these liquors in single drinks, charging I think twenty-five cents a drink for this whiskey, though it may have been fifty cents, I would not be sure whether it was twenty-five or fifty cents, a drink. He also had on hand and served to his guests, soft drinks

such as near beer, soda pop, etc. These parties generally came there at night-time. There was usually someone there nearly every night who was served with drinks. I saw a great many people drunk at this place. He sometimes entertained guests all night, furnishing them with sleeping quarters. This generally happened when some one would get too drunk to go home. Rousseau would also allow men and women to occupy rooms at this place provided they stated to him that they were man and wife. He paid me no wages for staying at this place, but I had a room and I was allowed to make such money as I could by entertaining men in my said room. I made on an average of $20.00 or $25.00 a week that way. Before I went keeping house for said Rousseau about November 15, 1918, I occupied one of the tenant houses on his premises at Mukilteo near his residence. I occupied that place for about four months. I was living there with a boy with whom I have since been married. There were also three other boys living at this house. I have seen Nellie Laxdahl, Helen Elliott, Francis Stewart, Sigfried Johnson, Florence Young, Tommie (deep sea diver) Jack Ray, Ruby Gordon, Hanlymer, Dorothy _____, Sam Sorrenson, Billie Shields, Charles (long shoreman) Babe Colligan and Billie Waddell. and others.

(Sgd.) Carrie Scott Karris.

Subscribed and sworn to before me this 6th day of September, 1919.

(Sgd.) Quintus A. Kaune (?)
(Seal) Notary Public in and for the State of Washington, residing at Everett "

(2) The letter of the Deputy Prosecuting Attorney of Snohomish County to T. W. Lynch, Acting United States Commisioner of Immigration, Seattle, Washington, marked Exhibit "A" and attached to the

Department of Labor files, which is in words and figures as follows to-wit:

"Everett, Wash., December 28, 1920.

Mr. T. W. Lynch,
Acting U. S. Commission of Immigration,
Seattle, Washington,

Dear Sir:

We are in receipt of your letter of the 17th instant, regarding case of Joseph Rosseau, now serving a sentence in the Washington State Penitentiary on a charge of being a jointist. We inclose herewith a certified copy of the Information, Judgment, Sentence, and Commitment in this case. From this inforation you will gain some idea of the character of the charge against this man.

Our state prohibition law, as amended by Chapter 19 of the Session Laws for 1917, defines a jointist as any one who opens up, conducts or maintains a place for the unlawful sale of intoxicating liquor.

Rousseau is an old-time resident of this city. When the town was wide open he was the king of the "Tenderloin District." The place which he conducted at Mukilteo in this county and for which he was convicted on the charge of being a jointist was a notorious road house. He sold liquor to young girls who came there in parties, some of whom were as young as fourteen years.

We inclose herewith the affidavit of his housekeeper, who is a notorious prostitute, and who was sometime ago living in Seattle. This affidavit gives you some idea of the place he was conducting at Mukilteo.

Although a man with no moral sense whatever, he is nevertheless a man who has a reputation of being

square in all business dealings and a man whose word can be absolutely relied upon. The man simply has no moral sense. He is a man about seventy years of age.

Yours truly,
(Sgd.) Q. A. Kaune (?)
Deputy Prosecuting Attorney."

COPY
QAK/EMR.

V

The court erred in holding appellant was not deprived of a fair hearing by reason of the fact that no opportunity was given him at said hearing to offer testimony explanatory of that elicited from him by the examining inspector.

VI

The court erred in holding that the petitioner had been convicted of a crime involving moral turpitude prior to his entry to the United States in October, 1920.

VII

The evidence is insufficient to sustain the warrant of deportation and the decree of the lower court in affirmance thereof.

The several specifications of error will be discussed in the order made.

The first five invoke the well established doctrine that where the alien has been deprived of a fair

hearing the petition for a writ of Hebeas Corpus should be granted *Ex Parte Radivoeff*, 278 Fed. 227.

❖ ❖ ❖

ARGUMENT

I

At the threshold of this discussion we deplore the misdirected zeal of the Department of Labor which demanded that appellant be given his hearing while in prison. We do not urge that the hearing should have been attended with all the formal rules in vogue in trial courts, but we insist that appellant was deprived of elementary rights in this Star Chamber session.

The hearing, so-called, had no element of publicity and was conducted in the State Penitentiary in the presence alone of United States Immigrant Inspector and his stenographer. Appellant, who at the time had served about three months of a one to five year sentence, was asked if he wanted an attorney. Small wonder that with liberty so far away it hardly seemed worth fighting for, he answered "No." Appellant's answers were naturally guarded by unaccustomed prison discipline and the depression which goes with such confinement and we can imagne that his restraint was more actual than figurative. Literally his hands were tied.

What a simple matter it would have been for the Department of Labor to have avoided all suspicion of unfairness by executing the warrant of arrest on Rousseau's release from the Penitentiary and then according him the hearing to which he was entitled. We think a presumption of unfairness not rebutted by the record arises from the facts above enumerated.

II

We now come to further evidence of that which seems part of a studied course to deprive appellant of a fair hearing. We refer to the preference by the examining Inspector of additional charges at the hearing. The warrant of arrest charged appellant with but two violations of the Immigration Act, neither of which the Immigrant Inspector attempted to prove at the hearing. (See Warrant of Arrest attached to Dept. of Labor files). At the hearing the Immigrant Inspector charged appellant with certain additional violations of the Immigration Act of Feb. 5, 1917:

(1) "That he had been convicted of, and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; (2) that he has been found connected with the management of a house of prostitution, or other place habitually frequented by prostitutes, or where prostitutes gather; (3) that he has

been found receiving, sharing in, or deriving benefit from the earnings of a prostitute."

and it is upon these last three grounds that the case of the government is now rested.

Perhaps where the evidence unexpectedly develops further breaches of the Immigration Act of which the examining Inspector was not aware before the hearing, he would be warranted in putting additional charges at that time, but such was not the case here. Nearly a month before the Penitentiary hearing took place the Seattle office of the Department of Labor had possession of certified copies of the Information, Judgment, Sentence and Commitment in the case in which Rousseau had been convicted as a "jointist" and said office also had at that time the affidavit of one Carrie Scott Karris set forth *supra* on pp. 6-7, supporting the other violations relied on. (See letter Deputy Prosecuting Attorney, Snohomish County, marked Exhibit "A," attached to Department of Labor files). These documents were later forwarded to the Immigrant Inspector at Walla Walla with instructions, no doubt, to incorporate them into the testimony given at the hearing. Clearly the Department of Labor was well prepared to foist these additional charges on appellant at the hearing and

the record shows that appellant was as surely unprepared to meet them. The manner in which these additional charges were put contains every element of surprise and was fundamentally disconcerting and unfair. Examination of that portion of the Department of Labor Files in which the additional charges were put, conclusively demonstrates that they were not the result of unlooked for testimony (See pp. 5, 6 and 8, Dept. of Labor files), that they were not relevant nor did they pertain to any testimony that had gone before them. They came like a thunderbolt out of a clear sky. After appellant had testified that

"I don't believe I voted for President. It has been ten or twelve years since I voted for President. They demanded me to bring my papers and I told them that I didn't need them and before I would have a fuss I quit voting, ten or twelve years ago" (p. 5, Dept. of Labor files), he is advised.

"Now, Mr. Rousseau, in addition to the charges contained in the warrant of arrest which I have just explained to you, the further charge is now placed against you, that you are in the United States in violation of the United States Immigration Act approved February 5, 1917, in that you were of the inadmissible classes of aliens at the time of entry to the United States through the port of Blaine, Washington, October 12, 1920, in that you had been convicted of a crime involving moral turpitude prior to your last entry to the United States."

The same may be said of the remaining additional charges put to appellant (See pp. 5, 6, 8, Dept. of Labor files). We find it hard indeed to draw a charitable conclusion from the failure of the Immigrant Inspector to include all the charges which he knew would be made against appellant in the warrant of arrest.

In its decision the District Court passed over this phase of the question by saying:

"The practice of preferring a number of charges against an individual by an examining inspector during a summary hearing is one that should be discouraged. It is not in harmony with the thought of fair dealing." (Tr. p. 17.)

If this statement of the law, mild as it appears to us, is correct we fail to see why the petition of appellant was not granted.

III.

The fourth assignment of error embraces the incorporation of certain ex parte documents, Exhibits "A" and "C," in the record of the testimony given at the hearing. These documents, the affidavit of Carri Scott Karris and the letter of Q. A. Kaune, Deputy Prosecuting Attorney, are set forth in toto on pp. 6-7-8, *supra*. They contain matter of the most prejudicial and damaging nature and

undoubtedly account for the refusal of the Secretary of Labor in passing on the records to exercise the favorable discretion given him under Section III of the Immigration Act, providing that: "Aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years may be admitted in the discretion of the Secretary of Labor and under such conditions as he may prescribe." The District Court while recognizing the incompetency of this sort of testimony (Tr. p. 17) was of the opinion that appellant was not prejudiced because these documents did not prevent a fair hearing on the charge of conviction of a felony or other crime involving moral turpitude. But for the reasons above stated it is clear appellant was substantially prejudiced by the use of said documents.

Here as in *Ex Parte Radivoeff*, 278 Fed. 227,

> "The great test of truth, cross-examination of adversary witnesses, provided for by Department Rule 24 was denied the alien. * * * Not only general principles of law were violated but also department rules. These latter in so far as consistent with law are themselves law and be it noted law for government—for the department as well as for aliens. In connection with the general law of the land, the rules constitute for aliens in deportation proceedings the due process of law guaranteed by the Federal constitution to all men."

And quoting further from the same opinion:

"In deportation hearings, if the department resorts to statements, whether or not verified by inspectors or others, failing to produce the makers of the statements for the aliens cross-examination, it cannot escape the consequence of ex parte and incompetent evidence by any plea of distance or expense."

IV.

The fifth specification of error embraces the neglect of the examining inspector to afford appellant an opportunity, after the examination of appellant was ended, to give testimony *in his own behalf*. It is the usual practice and we cannot account for the fact that it was not allowed appellant, for the examining inspector, after he has completed his case, to advise the alien that he now has an opportunity to offer any evidence on his behalf which would tend to throw light on the subject matter of the hearing. The record is devoid of any such request. This is but another circumstance which unerringly points to the conclusion that appellant was deprived of a fair hearing.

V.

The remaining points will be discussed under the VII specification of error. In ascertaining whether the Department of Labor files show a violation of the Immigration Act of February 5,

1917: "All the grounds set forth in the warrant of deportation," to use the words of the District Judge (Tr. p. 15), "except the first may be disregarded. The testimony shows that the petitioner has property in Mukilteo worth $10,000.00. He was not likely to become a public charge which means one likely to become an occupant of an alms house for want of means of support. *Gegiow v. Uhl*, 239 U. S. 60, or likely to be sent to an alms house and supported at public expense, *Ex Parte Mitchell*, 256 Fed. 299. *Howe v. Ex Rel. Savitsky*, 247 Fed. 292; *Ng Fung He v. White, Immigration Com'r.*, 266 Fed. 765. Any testimony relating to the other grounds of deportation (that appellant had been found connected with the management of a house of prostitution and receiving or deriving benefit from the earnings of a prostitute) shows such act, if any, to have taken place long prior to his entry to the United States in October, 1920." To make plainer the lower court's last remark we quote the controlling portion of the Immigration Act providing for the deportation of "Any alien who *shall be found* connected with the management of a house of prostitution *after such alien shall have entered the United States*, or who *shall* receive, share in or derive benefit from any part of the earnings of any prostitute."

The remaining question is whether the crime of being a "Jointist" is a crime involving moral turpitude within the meaning of the Immigration Act. A "jointist" is described by Sec. 11, Laws of Wash. 1917, page 60, being the "Liquor" statute of Washington as "any person who opens up, conducts or maintains, whether as principal or agent, any place for the unlawful sale of intoxicating liquors." The crime is made punishable by imprisonment for not less than one nor more than five years, and would come within the definition of a felony, under the Federal laws. Sec. 335, Penal Code. The language of the act is "Persons who have been convicted or who have admitted the commission of a felony or other crime or disdemeanor involving moral turpitude." The lower court took the position that conviction of a felony is ground for exclusion. It seems plain to us, however, that "moral turpitude" was intended to modify "felony" as well as the other nouns directly preceding it. In any event, appellant who was at the hearing only apprised of the charge that he had "been convicted of a crime involving moral turpitude" (Tr. p. 5), cannot be deported on a broader ground.

In *U. S. v. Uhl*, 210 Fed. 860, the alien had been convicted and sentenced to 12 months' impris-

onment in England on an indictment laid under a libel act providing for the punishment of any person who shall "maliciously publish any defamatory libel." The libel charged the King of England with bigamy. The question was presented whether the crime involved moral turpitude and the court, after holding that it did not, laid down the rule that in order to hold as a matter of law that a crime involves moral turpitude it must appear to be of the essence and an essential element of said crime and that "This rule confines the proof of the nature of the offense to the judgment." The court there used an illustration analagous to the instant case.

"A statute of the United States (Rev. St. Sec. 2139) makes it a crime to give a glass of whiskey to an Indian under charge of an Indian Agent. A conviction under this section would not be proof of moral turpitude though the evidence at the trial might disclose the fact that the whiskey was given for the basest purposes."

It is to be borne in mind that the crime of "jointist" is one unknown to the common law and that before the enactment of the liquor law the acts prohibited by that law were not in disrepute. The legislative body enacting the clause in question intended, we think, to draw a distinction between crimes of an infamous nature and those which did

not essentially involve moral turpitude. The dividing line may be drawn by placing on the one side those crimes which are *malum prohibitum* and on the other those which are *malum in se*. The lower house of Congress has recently accepted this view in passing a bill providing for the deportation of an alien convicted of a violation of either the Volstead or Harrison Narcotic Acts. We submit that the crime of which appellant was convicted was not one involving moral turpitude.

The principle is too well settled to need citation that where the grounds for the alien's deportation are unsupported by the record the Department of Labor will be considered to have acted without jurisdiction in issuing the warrant of deportation and that this is a matter of law for the court.

We ask that appellant's petition for a writ of habeas corpus be granted for the following reasons:

(1) That appellant was denied a fair preliminary hearing.

(2) That there is nothing in the record showing a violation of the Immigration Act.

Respectfully submitted,

POE & FALKNOR,
Attorneys for Appellant.

NO. 3900

In the United States Circuit Court of Appeals

For the Ninth Circuit

ELI ROUSSEAU,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration for the District of Washington,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. JEREMIAH NETERER, *Judge.*

BRIEF OF APPELLEE

STATEMENT OF CASE

The appellant while held by the Commissioner of Immigration on a warrant of deportation applied to the District Court for a writ of habeas corpus. A return was filed and a hearing had, after which an order denying the writ was entered. This order is appealed from.

Appellant was convicted in the Superior Court of Snohomish County, Washington, of the crime of being a "jointist" and was sentenced to the State Penitentiary to serve an indeterminate sentence at hard labor of from one to five years. An appeal was perfected to the Supreme Court of the State and during its pendency appellant was at large on bond. During this time he left the jurisdiction and made a visit in the eastern portion of the United States and Canada, and hearing of the affirmance of his conviction returned to the state of Washington from and through Canada, entering at the port of Blaine, Washington, and claiming to the officers that he was a citizen of the United States. A warrant was issued charging that appellant Rousseau landed at the port of Blaine, Washington, on the 12th of October, 1920, and that he had been found in the United States in violation of the Immigration Act of February 5, 1917, for the reason:

> "That he was a person likely to become a public charge at the time of his entry; and that he entered without inspection."

A hearing was had upon these charges at which the appellant was not represented. However, he was advised of his right to counsel, which he declined. Additional charges were preferred and in

each instance appellant was asked if he desired an attorney but always answered in the negative. After this hearing a warrant of deportation was issued which warrant contained the following recitations:

> "That he has been convicted of, and admits having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States; that he has been found connected with the management of a house of prostitution, of other places habitually frequented by prostitutes, or where prostitutes gather; that he has been found receiving, sharing (13) in, or deriving benefit from the earnings of a prostitute; and that he was a person likely to become a public charge at the time of his entry."

ARGUMENT

At the outset this Court's attention is invited to the opening sentence of Judge Neterer's decision wherein he states:

> "All of the grounds set forth in the warrant of deportation, except the first, may be disregarded." (Tr. p. 15).

The portion of the warrant upon which Judge Neterer rests his decision is as follows:

> "That he has been convicted of and admits having committed a felony or other crime or

misdemeanor involving moral turpitude prior to his entry into the United States * * *;"

The trial judge, having thus cogently narrowed the proposition upon which his decision rested, it seems patent that the first four of appellant's assignments of error listed in his brief are beside the issue as they have to do with matters and things which the court disregarded.

That Judge Neterer did not consider any of the grounds other than the one above mentioned is very clearly pointed out and indicated in the concluding paragraph of his opinion (Tr. p. 17), wherein he with some apparent asperity took exception to the Immigration Service's method of conducting hearings.

Answering appellant's fifth assignment of error, it may be observed that counsel in the second paragraph of their argument at page ten of their brief use the following language: "Appellant * * *, was asked if he wanted an attorney."

Discussing appellant's sixth assignment of error, it may be observed that in his petition for a writ of habeas corpus (Tr. p. 4) appellant states the fact to be that he was convicted in the Superior Court of the State of Washington for Snohomish

County of the crime of being a Jointist, and it is not denied at any point in the record that this conviction took place prior to his last entry into the United States from the Dominion of Canada.

It is conceded by the appellant that he never has been a citizen of the United States.

Having these facts in mind the only issue which this Court has to decide is whether or not Judge Neterer correctly determined that a conviction in the State of Washington of the crime of being a "Jointist" is a conviction of a felony involving moral turpitude.

A "Jointist" is defined as follows:

> "Any person who opens up and conducts or maintains either as principal or agent any place for the unlawful sale of intoxicating liquors be, and hereby is defined to be a 'jointist.' Any person convicted of being * * * a jointist * * * as herein defined shall be guilty of a felony and shall be punished by imprisonment for not less than one year or more than five years."

Laws of Washington, 1917, Chap. 19, p. 60.

Under the Federal law a felony is an offense punishable by death or imprisonment for a term exceeding one year.

Penal Code, paragraph 335.

From the statute above quoted it may be stated without cavil that the appellant Rousseau was convicted of a felony prior to his last entry.

As to the question of whether or not the crime of being a "Jointist" involves moral turpitude, it might be observed that the term is expressive and cannotes the idea of an individual conducting and maintaining a low resort of ill repute. In carrying out this thought we cannot do better than quote the following portion of Judge Neterer's opinion (Tr. p. 16), wherein he cites authorities supporting his conclusions that being a "Jointist" involves moral turpitude:

> " 'Turpitude,' is defined, Bouvier, 'Everything done contrary to justice, honesty, modesty, or good morals, is said to be done with turpitude'; 'Moral,' Webster, 'The doctrine or practice of the duties of life pertaining to those intentions and actions of which right and wrong, virtue and vice, are predicated or to the rules by which such intentions and action ought to be directed; relating to the practice, manners, or conduct of men as social beings in relation to each other, as respects right and wrong so far as they are properly subject to Rules.' Moral Turpitude has been defined as an act of baseness, vileness, or depravity in private and social duties which man owes his fellow men, or to society in general, contrary to the acts and customary rules of right and

> duties between man and man. Vol. 5, Words & Phrases, p. 4580. Moral Turpitude is 'depravity in the private social duties which a man owes to his fellow man or to society in general. An act contrary to the accepted and customary rules of right and duty between man and man.' 20 Am. & Eng. Ency. of Law, p. 872."

Certainly a "Jointist" is one who transgresses the law and rules of conduct as herein above defined and quoted.

As to the last assignment of error, it may be stated that it is a familiar rule that the court in habeas corpus proceedings will not disturb the findings of the Commissioner of Immigration in deportation proceedings if the court finds upon an examination of the record that there is *any evidence* to support the findings of the Commissioner.

> *Chin Yow vs. U. S.*, 208 U. S. 8;
> *Ex parte* Moaha Singh, 207 Fed. 780;
> *Ex parte* Chin Doe Tung, 236 Fed. 1017.

Certainly there can be no contention made that the Commissioner was without some evidence to support that part of the warrant of deportation upon which Judge Neterer hinged his decision.

Concluding, it is respectfully asserted that appellant Rousseau was given an opportunity to have

counsel at the Commissioner's hearing. That prior to his last entry into the United States he was convicted of a felony which involved moral turpitude. That there is admittedly sufficient evidence to support that part of the warrant of deportation upon which the trial court grounded his decision.

From these conclusions it seems to be clear that appellant violated that portion of the Immigration Act of February 5th, 1917,

39 Statutes at Large 889,
4289¼jj C. S. 1918,

which provides for the exclusion of an alien convicted of a crime involving moral turpitude.

Respectfully submitted,

THOMAS P. REVELLE,
United States Attorney.

JOHN A. FRATER,
Assistant United States Attorney,
Attorneys for Appellee.

No. 3901

United States
Circuit Court of Appeals
For the Ninth Circuit.

LOU RAFFOUR, CHARGED AS LOU TAFFOUR,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

No.

United States
Circuit Court of Appeals
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LOU RAFFOUR, CHARGED AS LOU TAFFOUR,
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Defendant in Error.

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INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys.

For Plaintiff in Error:

LEO V. YOUNGWORTH and HARRY J. McCLEAN, Esqs., Merchants National Bank Building, Los Angeles, Calif.

For Defendants in Error:

JOSEPH C. BURKE, Esq., United States District Attorney.

JOHN R. LAYNG, Esq., Assistant United States District Attorney.

UNITED STATES OF AMERICA, SS.

To UNITED STATES OF AMERICA, and the HONORABLE J. C. BURKE, United States District Attorney, Southern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 27th day of June A. D. 1922, pursuant to Writ of Error in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain proceeding United States versus Lou Raffour, defendant. and you are ordered to show cause, if any there be, why the judgment in the said proceeding mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable OSCAR A. TRIPPET United States District Judge for the Southern District of California, this 31 day of May, A. D. 1922, and of the Independence of the United States, the one hundred and Forty Six.

Trippet

U. S. District Judge for the Southern District of California.

Approved as to form, as provided in rule 45.

Joseph C. Burke

By John R. Layng

Attorney.

[Endorsed]: No. 3404, S. D. In the United States Circuit Court of Appeals for the NINTH CIRCUIT UNITED STATES OF AMERICA vs. LOU RAFFOUR, Citation FILED JUN 2, 1922 at—min past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E. Wire Deputy

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UNITED STATES OF AMERICA, SS.

The President of the United States of America,

To the Judges of the District Court of the United States, for the Southern District of California, GREETING:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said District Court, before you between United States, plaintiff versus Lou Raffour, defendant a manifest error hath happened, to the great damage of the said defendant as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 27th day of June next, in the said United States Circuit Court

of Appeals, to be there and then held that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the HON. WILLIAM HOWARD TAFT, Chief Justice of the United States, this 31st day of May in the year of our Lord one thousand nine hundred and 22 and of the Independence of the United States the one hundred and 46th

CHAS. N. WILLIAMS
Clerk of the District Court of the United
(Seal) States of America, in and for the Southern District of California.

The above writ of error is hereby allowed.

Trippet Judge.

By R S Zimmerman, Deputy Clerk.

Approved as to form, as provided in rule 45.

Joseph C. Burke
By John R. Layng
Attorney

[Endorsed]: # 3404 United States Circuit Court of Appeals for the NINTH CIRCUIT United States Plaintiff in Error vs. Lou Raffour, Defendant in Error Writ of Error FILED JUN 2 - 1922 at —min past — o'clock —M CHAS. N. WILLIAMS Clerk Murray E. Wire Deputy.

No. Filed

Viol. Sec. 3 and 21, Title II, of the National Prohibition Act of October 28, 1919.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff,	)	
vs	)	INFORMATION
LOU TAFFOUR, Defendant.	)	

Leave of Court first being had and obtained, comes now Robert O'Connor, Esq., United States Attorney for the Southern District of California, who for the said United States of America in this behalf prosecutes, on this 7th day of November, A. D. 1921, in the July term thereof, and for said United States gives the Court to understand and be informed:

That LOU TAFFOUR, whose full and true name, other than as herein stated, is to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 1st day of October A. D. 1921, at 536 State St., in the City of Santa Barbara, County of Santa Barbara, within said division and district, and within the jurisdic-

tion of the United States and this Honorable Court, did knowingly, wilfully and unlawfully have in his possession for beverage purposes certain intoxicating liquor, to-wit: three (3) quarts of Moonshine Brandy, containing alcohol in excess of one-half of one per cent by volume; in violation of Section 3, Title II of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

SECOND COUNT

And the said Robert O'Connor, who prosecutes for the United States as aforesaid, does further give the Court to understand and be informed:

That LOU RAFFOUR, whose full and true name, other than as herein stated, is to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 17th day of October, A. D. 1921, at 536 State St., in the City of Santa Barbara, County of Santa Barbara, within said division and district, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully have in his possession for beverage purposes certain intoxicating liquor, to-wit: one bottle each of Kola Quina, Ferro Chino, Huffland Bitters and Raisin Wine, containing alcohol in excess of one-half of one per cent by volume; in violation of Section 3, Title II, of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

THIRD COUNT

And the said Robert O'Connor, who prosecutes for the United States as aforesaid, does further give the Court to understand and be informed:

That LOU RAFFOUR, whose full and true name, other than as herein stated, is to affiant unknown, late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 17th day of October, A. D. 1921, at 536 State St., in the City of Santa Barbara, County of Santa Barbara, within said division and district, and within the jurisdiction of the United States and this Honorable Court, did knowingly, wilfully and unlawfully maintain a common nuisance, to-wit: a room, building and place at 536 State St., in the said City of Santa Barbara, where intoxicating liquor, to-wit: Moonshine Brandy and Huffland Bitters and Raisin Wine then and there containing alcohol in excess of one-half of one per cent by volume, were kept, sold and bartered for beverage purposes; in violation of section 21, Title II of the National Prohibition Act of October 28, 1919;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

WHEREUPON, the said Attorney for the United States, who prosecutes as aforesaid in this behalf,

prays the consideration of the Court in the premises, and that due process of law may be awarded against the said LOU RAFFOUR in this behalf to make him answer the said United States concerning the premises aforesaid.

Robert O'Connor

United States Attorney

Mark L Herron

Assistant United States Attorney

SOUTHERN DISTRICT OF CALIFORNIA)
) SS
SOUTHERN DIVISION)

D. J. O'LEARY, being first duly sworn, on oath says: That he is Federal Prohibition Agent; that he has read the foregoing Information charging Lou Raffour with violation of Sections 3 and 21, Title II of the National Prohibition Act of October 28, 1919.

Affiant further says that the matters and things contained in said Information are true in substance and in fact.

D J O'Leary

Subscribed and sworn to before me this 7 day of November, 1921.

Chas. N. Williams,
Clerk U. S. District Court Southern District of California.

By R S. Zimmerman
(Seal) Deputy Clerk, United States District Court.

[Endorsed]: No. 3404 Cr IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant. INFORMATION Filed Nov. 7 - 1921 at —min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Louis J Somers Deputy Bond $1000

At a stated term, to wit, the July Term, A. D. 1921, of the District Court of the united States of America, within and for the Southern Division of the Southern District of California held at the court room thereof, in the City of Los Angeles, on Monday the 7th day of November in the year of our Lord one thousand nine hundred and twenty one.

PRESENT: THE HONORABLE OSCAR A. TRIPPET, District Judge.

United States of America, Plaintiff	)	
vs.	)	No. 3404 Crim. S. D.
Lou Taffour Defendant.	)	

A verified Information having been presented to the court at this time, EX PARTE, by Mark L. Herron, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, it is by the court ordered, pursuant to a motion made by said attorney, that said Information be filed and the bond of defendant Lou Taffour fixed in the sum of $1000.00; and this cause

coming on at this time for arraignment and plea; defendant Lou Taffour being present in Court with his attorney E. E. Van Bever, Esq., and defendant having been called and arraigned and having stated his name to be Lou Raffour and upon being required to plead, having enterposed his plea of NOT GUILTY, it is by the court ordered that this cause be continued to December 13th, 1921, for trial.

AT A STATED TERM, to wit, the January Term, A. D. 1922 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court room thereof, in the city of Los Angeles on Tuesday the 21st day of March in the year of our Lord one thousand nine hundred and twenty two.

PRESENT: THE HONORABLE OSCAR A. TRIPPET, District Judge.

United States of America, Plaintiff	)	
vs	)	No. 3404 Crim. S. D.
Lou Raffour Defendant	)	

This cause coming on at this time for the trial of defendant Lou Raffour before a jury to be impanelled herein; T. F. Green, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, and defendant being present in court with his attorney Emile V. Van Beber, and counsel for the respective parties having announced their readiness to proceed with the trial

of this cause and the court having ordered that this cause be proceeded with and that a jury be impanelled herein; and

Thereupon the following twelve names were drawn from the jury box, to wit:

H. M. Rosine; Otis E. Tiffany; C. W. Redman; M. W. Halsey; Beau De Zart; Geo. Barfoot; Dan Campbell; J. Mitchell; H. Benjamin; O. S. Newton; Donald Keith; and Wm McNees; and said jurors having been called and sworn on voir dire and passed for cause by the court and

Said H. Benjamin having been peremptorily challenged by counsel for the plaintiff and by the court excused; and

Thereupon the name of A. R. Marsom was drawn from the jury box and said juror having been called and sworn on voir dire and counsel for the respective parties not desiring to exercise their right to further peremptorily challenge the jurors now in the box, it is by the court ordered that said jurors be sworn in a body as the jurors to try this cause, said jury being as follows, to wit:

THE JURY:

1. H. M. Rosine,
2. Otis E. Tiffany,
3. C. W. Redman,
4. M. W. Halsey,
5. Beau De Zart,
6. Geo. Barfoot
7. Dan Campbell,
8. J. Mitchell,
9. A. R. Marsom
10. O. S. Newton,
11. Donald Keith,
12. Wm McNees

and

W. J. Wall having been called, sworn and having testified in behalf of the plaintiff and in connection with his testimony the following exhibits having been offered and admitted for Identification and in evidence, as indicated, on behalf of the plaintiff, to wit:

U. S. Ex. No. 1 (for Identification) Large bottle light colored liquid labelled Columbia Drug Co.

U. S. Ex. No. 2 (in Evidence) Small 16 oz bottle typewritten label

U. S. Ex. No. 3 (for Identification) Bottle and contents light liquid

U. S. Ex. No. 4 (for Identification) Small plain bottle light colored liquid and

Herbert Frank Maston having been called, sworn and having testified in behalf of the Government; and

W. J. Wall having been recalled and having testified further; and

C. W. Wheeler having been called, sworn and having testified in behalf of the Government; and in connection with his testimony the following exhibits having been offered and admitted for Identification and in evidence, as indicated, on behalf of the plaintiff, to wit;

U. S. Ex. No. 5 (for Identification) Green bottle labelled "Fernet"

U. S. Ex. No. 6 (for Identification) Hufeland bottle and contents

U. S. Ex. No. 7 (in Evidence) Small brown bottle and contents

U. S. Ex. No. 8 (in evidence) Cartons and two bottles—empty labelled Hufeland Bitters.

and

C. J. Wall having been recalled by the court and questioned; and

C. H. Wheeler having been recalled and having testified; and

It is now by the court ordered, upon motion of counsel for the Government that plaintiff's exhibits Nos. 1, 2, 3 and 4, heretofore offered for Identification, be admitted in evidence as U. S. Ex's Nos. 1, 2, 3 and 4 respectively; and

It is further by the court ordered, upon motion of counsel for the plaintiff, that U. S. Ex. No. 5, heretofore offered for Identification, be admitted in evidence as plaintiff's Ex. No. 5; and

Now, at the hour of 11:30 o'clock A. M. the court admonishes the jury that during the progress of this trial they are not to speak to anyone about this cause or any matter or thing therewith connected and that until this cause is submitted to them for their consideration under the instructions of this court they are not to speak to each other about this cause or anything therewith connected, and declares a recess; and

Now, at the expiration of said recess the court having reconvened and all being present as before, it is by the court ordered, upon motion of counsel for the plaintiff that plaintiff's Ex. No. 6, to wit: small bottle and contents in the Hubeland Bitter bottle, heretofore offered and admitted for Identification be now admitted in evidence; and

Thereupon the Government rests; and

Defendant herein, L. Raffour, having been called, sworn and having testified in behalf of himself, it is by the court ordered, at the hour of twelve o'clock, noon, that a recess be taken to the hour of two o'clock P. M. the jury having again received the aforementioned admonition; and

Now, at the hour of two o'clock P. M. the court having reconvened and all parties being present as before and counsel for respective parties having announced themselves as ready to proceed with the trial of this cause and the court having ordered that this cause be proceeded with; and

L. Raffour having resumed the stand and having testified further; and

Thereupon the defendant rests; and

C. J. Wall is recalled and testifies further for the Government on rebuttal; and at the hour of 2:37 o'clock P. M. John R. Layng Esq. argues to the jury on behalf of the Government and at the hour of 2:40 o'clock P. M. Emile E. Van Beber, Esq. argues to the jury on behalf of the defendant and at the hour of 2:50 o'clock P. M. said John R. Layng Esq. having argued to the jury in rebuttal; and

The court having instructed the jury with respect to the law involved in this cause and L. Sabin having been sworn to care for the jury during the deliberation of its verdict and the jury having retired at the hour of 3:20 o'clock P. M. to deliberate upon its verdict; and

Now, at the hour of 3:25 o'clock P. M.; the jury return into court in charge of their foreman and all being present as before and the court having asked said foreman if the jury has agreed upon a verdict and said foreman having replied that they have so agreed; and, upon being requested to present the same, and said verdict as so presented and read by the clerk of the court being as follows, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. United States of America, Plaintiff vs. Lou Raffour, charged as Lou Taffour, defendant. No. 3404 Crim. S. D. We, the jury in the above entitled cause, find the defendant Lou Raffour, charged as Lou Taffour, guilty as charged in the first count of the Information; and guilty as charged in the second count of the Information and guilty as charged in the third count of the Information. Los Angeles, California, March 21, 1922. Irving J. Mitchell, Foreman, and

Now, good cause appearing therefor, it is by the court ordered that this cause be continued to March 27th, 1922. for sentence of defendant herein, said defendant to go on his present bond.

At a stated term to wit, the January A. D. 1922 Term of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the court

room thereof, in the City of Los Angeles, on Monday the 27th day of March in the year of our Lord one thousand nine hundred and twenty two.

PRESENT: THE HONORABLE OSCAR A. TRIPPET District Judge.

United States of America,	Plaintiff,	)
		) No. 3404
vs.		)
		)Crim. S. D.
Lou Raffour, Defendant		)

This cause coming on at this time for sentence of defendant Lou Raffour; John R. Layng, Esq., Assistant U. S. Attorney, appearing as counsel for the Government, and defendant being present in court with his attorney E. E. Van Beber, Esq., the court now pronounces sentence upon defendant in this cause for the offence of which he now stands convicted, namely, violation of the National Prohibition Act of October 28th, 1919, and it is the judgment of the court that said defendant pay unto the United States of America a fine in the sum of $500.00 on the first count and stand committed to the Santa Barbara County Jail until paid or defendant is discharged according to law, and it is further ordered that said defendant pay unto the United States of America a fine in the sum of $500.00 on the second count and stand committed to the said Santa Barbara County Jail until said fine is paid or defendant is discharged according to law, said sentence imposed on the second count for failure to pay the fine assessed on said second count not

to commence to run until the expiration of sentence imposed on the first count for failure to pay the fine assessed on the said first count, and it is further ordered that said defendant stand committed to the Santa Barbara County Jail for the term and period of nine (9) months on the third count, said sentence imposed on the third count not to commence to run until the expiration of sentence imposed on the second count for failure to pay the fine assessed on the said second count; and it is further ordered by the court that defendant herein take his own commitment and enter said Santa Barbara County Jail on April first and that the liquor seized in this cause be turned over to the United States Marshal for destruction.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA.
SOUTHERN DIVISION.

****

United States of America, Plaintiff	)	
	)	
Vs.	)	No. 3404
	)	Crim. S. D.
Lou Raffour, charged as Lou Taffour, Defendant.	)	

We, the Jury in the above-entitled cause, find the defendant Lou Raffour, charged as Lou Taffour, —Guilty as charged in the First Count of the Information; and—Guilty as charged in the Second

Count of the Information, and—Guilty as charged in the third count of the Information.

Los Angeles, California, March 21, 1922.

Irving J. Mitchell

FOREMAN.

Filed March 21, 1922

Chas. N. Williams
Clerk
By Louis J Somers
deputy.

[Endorsed]: No. 3404 Crim. IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION United States of America vs. Lou Taffour true name Lou Raffour Judgment Roll Filed April 7 1922 CHAS. N. WILLIAMS Clerk By Louis J Somers, Deputy Clerk Recorded Minute Book No. 43 Page 208

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	#3404 - Criminal
vs.	)	BILL OF EXCEPTION.
LOU RAFFOUR,	)	
Defendant.	)	

Be it remembered that heretofore, to wit, on the 21st day of March, 1922, the above entitled action came on regularly for trial the plaintiff appearing by John Layng, Assistant U. S. District Attorney and the defendant appearing by Emile Van Bever and George Appell, and that thereupon the following evidence was introduced and proceedings and exceptions taken, and no other, except as are hereinafter set forth.

W. J. WALL,

a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

That he was the Chief of Police, in the City of Santa Barbara, on or about the first day of October, 1921; that on that day he saw the defendant in his

(Testimony of W. J. Wall.)

place of business, at 536 State Street, Santa Barbara; that he went there to execute a search warrant issued out of the Police Court of Santa Barbara; that he searched the premises and found in a meat safe in the room behind the bar room, three bottles of wine; that he found in the money safe back of the bar, three bottles of moon-shine brandy; that the place of business was a regular bar, but is now used as a soft-drink parlor; that he initialed the bottles at the time he took them out of the money safe, and that he can identify the said three bottles by his initial. That he identified another bottle which is one of three found in the iron safe under the counter and which was labeled and initialed at the Police Station. That a fourth bottle was found under the bar from which the defendant served his drinks; that the said bottle was found by Officer Silva in his presence and marked by him when taken to the Police Station and labeled.

On cross-examination, the said witness testified that the bottles which he found on the premises of the defendant, and about which he testified, contained moon-shine brandy; that he had not tasted the contents of the bottles; that he had tested them with an alcoholic apparatus and found that they contained something between forty and fifty percent alcoholic content; that no record was kept of the test made.

HUBERT FRANK MANTUN

a witness called on behalf of the plaintiff, being first duly sworn testified as follows:

That he was a Police Officer in the City of Santa Barbara on October first, 1922, and that he accompanied Chief Wall to the defendant's premises at 532 State Street; that he served the search warrant on the defendant; that he saw the bottles offered as plaintiff's exhibits for identification on the premises of the defendant; that there were three bottles of wine which were in a meat safe or rather an ice box adjoining the kitchen; that there were two cases at the rear of the cafe filled with patent medicine; that he went into the back yard but did not go into the cellar; that in the back yard he found cases of empty bottles, beer bottles, some medicine bottles; some empty wine of pepsin bottles; that there was quite a pile of empty bottles in the back yard.

On cross-examination, the witness testified that show cases in the premises had pad-locks on them and contained patent medicines.

W. J. WALL

recalled for further examination testified:

That he went into the cellar of the defendant's establishment and found the cellar pretty well filled with empty bottles for bitters or wine called "Hufeland Bitters"; that he did not take any of the empty bottles with him.

C. H. WHEELER

a witness called on behalf of the plaintiff, being first duly sworn testified, that he is a Federal Agent of the Prohibition Department of the Government and was on the 17th day of October, 1921, at which time he visited the premises of the defendant, at 536 State Street, Santa Barbara, California.

Q. I will ask you to state the occasion of your going there and what you found, Mr. Wheeler.

A. "I visited there with a party of Federal Agents for the purpose of investigating what was being sold and what was being kept there, and whether it was in violation of the National Prohibition Act or not."

"I entered the premises with Agent Doyle and Mitchell, State Director Mitchell; made a search of the premises and found Hufeland Bitters, Kola Quina, Bitter Wine Tonic and a preparation, in my judgment, raisin wine, some kind of manufactured wine of which we have the samples here in the court room."

That he made an analysis for alcoholic content of all of the samples; that he took a sample from the container behind the bar of a kind of wine or grape juice; that the said sample tested 8.3% alcohol; that there were twenty-five or thirty cases, or more than twenty cases of empty bottles thrown promiscuously into a pile in the cellar; the cases held twelve bottles each; that he found a bottle behind the bar, three quarters full.

That plaintiff's exhibit #1, the large bottle, contained liquor of 50% alcoholic content as shown by hydrometer test.

W. J. WALL

recalled to the stand testified that the defendant had been in business in the City of Santa Barbara for a number of years, probably four or five; that in October, his business was principally soft drinks over the bar; that he did not have a drug store in his place, nor did he advertise as a drug store, nor did he have any accommodation for the sick.

That it was stipulated that plaintiff's Exhibits #2, 3 and 4 had the same alcoholic content as plaintiff's Exhibit #1; that it was stipulated that the report by R. F. Love, Government Chemist, that the Bitter Wine Tonic contained 17% alcohol; that the Kola Quina contained 19.7% alcohol and Ferra China contained 10.20%, may be accepted as evidence in the case.

C. H. WHEELER

returned to the stand and testified that plaintiff's Exhibit #5, showed 12.1% in alcoholic content.

L. RAFFOUR

the defendant, called as a witness in his own behalf, being first duly sworn testified, that resides in Santa Barbara and had resided there since his birth; that he is engaged in the soft drink business and was so engaged in October, 1921; that the bottles offered as Government Exhibits #1, 2 and 3, were taken out of his place of business, and at the time they were taken, were locked up in his safe.

Q. Could you, just briefly, tell us the circumstances

(Testimony of L. Raffour.)
surrounding these different bottles by yourself and the Chief of Police?

A. "Well, an officer came in and read a search warrant, I believe; the Chief came in and looked around the bar there, and finally asked me what I had in the safe; I asked him why, and he said, "can I see?" and I said "certainly." He said, "will you open the safe?" and I said "I will." So I opened the safe and he got hold of one of the bottles, and said, "What is this?", and I said, "Liquor I have there for my own use."

That he had had the contents of the three bottles referred to as Government Exhibits #1, 2 and 3 before prohibition went into effect; that he had had them for several months; that he did not have them for sale; that he sold the particular articles, known as Fernet and Hufeland Bitters by the bottle; that he bought the Hufeland Bitters from the Tonkin Distributing Company, in San Francisco; that he had two quarts of wine and a bottle one fifth full in the ice chest in the kitchen which he used principally for cooking purposes; that he used his cellar for storing near beer and to store all bottles; that on the first day of October, 1921, he had several cases of bottles in the cellar ready to ship; that he buys bottles from boys and ships them back to the people from whom he buys goods.

That on the 21st day of October he had some cider in his place of business when Mr. Wheeler was there;

(Testimony of L. Raffour.)

that he had, what they call, unfermentable Sherry and Muskat in a five gallon barrel; that Mr. Wheeler took some of this unfermentable Sherry and Port; that on the 21st day of October, 1921, he did not sell any Hufeland Bitters or Fernet or Kola Quina or Ferro China or Raisin Wine, for beverage purposes, and he sold the preparations by the bottle.

Q. As a matter of fact, you put all of these articles in stock there after prohibition went into effect?

A. I bought them as a remedy, as a medical proposition, which everybody handles and was supposed to be permissible to be manufactured by the Government as a patent or otherwise; that is the only reason I bought them.

That he did not have any permit to dispense medicines or sell patent medicines issued by the State.

W. J. WALL

recalled in rebuttal, testified:

That he visited the premises of the defendant on or about April 8th, 1921; that he found, as far as he could remember, three gallons of what is called Moonshine Brandy.

Thereupon, the Court instructed the Jury as follows:

Gentlemen of the Jury:

There are three counts in this information against the defendant.

The first count charges that he had in his possession, for beverage purposes, three quarts of moonshine

brandy. It is not necessary for the government to prove the quantity charged- if he had any moonshine brandy in his possession as charged in this information that would satisfy the law in that respect.

The second count in the information charges that he had certain formulae, or preparations, one known as Kola Quina- Ferro China, Hufeland Bitters and raisin wine, in his possession, and that they contained alcohol in violation of the law.

And the third count charges that he maintained a room building or place at 536 State Street, in the City of Santa Barbara, where intoxicating liquor - moonshine brandy, Hufeland Bitters, raisin wine - - then and there containing alcohol in excess of one-half of one per cent in volume, were kept sealed and bottled for beverage purposes.

It is not necessary for the government to prove he had all these things there, but if he had some intoxicating liquor, as charged in the information, at that place for beverage purposes, the government has proven the case in that respect.

It will be convenient for me, gentlemen, in discussing this case, to refer to some provisions of the law, which I shall read to you. One, Section 3 of this law, Title II, reads:

> "No person shall on or after the date when the Eighteenth Amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish, or possess any intoxicating liquor, except as

authorized in this Act, and all provisions of this Act shall be liberally construed, to the end that the use of intoxicating liquor as a beverage may be prevented."

You will see by that provision of the law that there is nothing, scarcely, that can be done with it - - intoxicating liquor - - without violating the law, except you come within the provisions of the law which authorize the use or sale of it. Now, Section 4 of this law provides:

"Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c and d of this section for beverage purposes, or any extract or syrup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, syrup, or other article is used as an ingredient," shall be a violation of this law.

In determining, gentlemen, whether or not the defendant was keeping this intoxicating liquor - - these bitters, etc. - - there for beverage purposes, you shall take into consideration the circumstances surrounding the case. Nobody has come here and testified that the defendant had these things there for beverage purposes, and it would not be probable that anybody could be found who could testify to that fact, because his

intentions are locked up in his bosom, unless he has told somebody what he intended to do. There are no windows in a man's head, by which you can look in and see what his intentions are, but you have got to determine that from the circumstances surrounding the case -- as to his intentions. Whether he intended, or had these liquors there for the purpose of selling them for beverage purposes, must be determined from the circumstances.

Among the circumstances that I might mention here that you are to look to, are the business of the defendant; was he in the business of selling medicine; was he in the business of affording remedies for any person who was sick? A beverage is a thing that you take for the pleasure that you derive from it; medicine is something that you take to make you well, to cure your sickness. A beverage is a thing that you take (to use the language of the street), a thing that you take out of which you get a "kick." You get exhilaration, intoxication.

Now, what was the defendant doing with these bitters? Was he administering to the sick, or was he disposing of this stuff for the pleasure the purchaser got out of it? That is the gist of that phase of this case, and you are to determine it from the circumstances surrounding the case.

Now, I wish to read some more of this law. The Volstead Act now authorizes the department, in charge of the enforcement of the law, to make certain rules

and regulations. Section 67 of the regulations provides:

> "Preparations manufactured under authority of this article may not be sold or used as beverages or for intoxicating beverage purposes, or under circumstances from which an intent on the part of the purchaser to use for such purposes might be reasonably deduced."

Those are the articles that the government permits to be manufactured for medicinal purposes.

Now, Section 68 reads as follows:

> "All persons desiring to use intoxicating liquor as provided in this article or, in the case of retail druggists or pharmacists, to sell intoxicating liquor in retail quantities, must file application on Form 1404 in the manner provided by Article III, and secure permit therefore from the Commissioner."

And in determining what this defendant had these things in his possession for, you would, quite naturally, inquire: Has he got a permit from the Commissioner to handle them? The burden is on him to show that he had a permit.

Section 69 provides:

> "A retail pharmacist, or a retail druggist where the sale is made through a retail pharmacist, may sell distilled spirits, wines, or the alcoholic medicinal preparations fit for beverage purposes which are authorized to be manufactured by Article XI in quantities of less than 5 wine gallons to other

persons holding permits entitling them to procure such liquor for non-beverage purposes on receipt of permits to purchase, Form 1410."

That is to say, the government permits the use of certain intoxicating liquors, to be mixed with cordials, etc., but the alcoholic content is kept below one-half of 1 per cent, and these permits are to be given to people who are supposed to be responsible, and will keep such alcoholic content down.

"Retail druggists or pharmacists may not sell intoxicating liquor in quantities of 5 wine gallons or more unless they are also wholesale druggists or wholesale pharmacists and hold permits to sell intoxicating liquor in wholesale quantities as provided in Article IX. No sale at retail may be made except through a pharmacist."

"b" Alcoholic medicinal preparations, fit for use for beverage purposes, as are authorized to be manufactured by Article XI hereof, and other liquor may be sold by retail pharmacists, or by retail druggists where the sale is made through a pharmacist, upon physicians' prescriptions to persons who do not hold permits to sell or use intoxicating liquor and without the necessity of receiving permits to purchase,".

"d" Retail druggists or pharmacists selling intoxicating liquors as such, whether upon physicians' prescriptions or otherwise are required to pay special tax as liquor dealers under the in-

ternal revenue laws, and to keep special tax stamp as such conspicuously posted."

The United States Attorney has asked me to read Section 33, Title II, of the law, which I shall read:

"After February 1, 1920, the possession of liquors by any person not legally permitted under this title to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this title.

Every person legally permitted under this title to have liquor shall report to the commissioner within ten days after the date when the eighteenth amendment of the Constitution of the United States goes into effect, the kind and amount of intoxicating liquors in his possession. But it shall not be unlawful to possess liquors in one's private dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used."

That is to say, gentlemen, if a person has had in his possession at the time this law went into effect in-

toxicating liquor, as many people undoubtedly did have, in their cellars or otherwise - - intoxicating liquor - - they had a right, in their dwelling, to keep it - - in their dwelling. They had no right - - nobody has any right - - to acquire any intoxicating liquor at this time from anybody, or for any purpose except medicinal purposes, by virtue of a prescription of a physician.

Now gentlemen, the law requires, in every criminal case, that the defendant be proven guilty beyond a reasonable doubt. I have heretofore explained, I presume, to everyone of you what reasonable doubt means, and that applies to this case as well as every other criminal case. You are the exclusive judges of the facts and the credibility of the witnesses, and if I make any comment upon either you are not bound by such comment, but should exercise your own independent judgment upon such matters.

The third count is the charge of maintaining a nuisance, Section 21 of this law tells us what a nuisance is:

> "A nuisance is a 'room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used", etc.,

shall be destroyed.

Gentlemen, if you find that this defendant kept intoxicating liquors in the place he had there as a soft drink place, in violation of the law; that is to say, if he kept these things there for beverage purposes, if

he kept them there unlawfully, if it was not liquor that was acquired before the law went into effect, and if that place was not his residence, he would be maintaining a nuisance, would be guilty under the third charge in this information.

Thereafter, the Jury returned a verdict of Guilty upon all three counts of the information herein.

Thereafter the Court sentenced the defendant to imprisonment in the County Jail of Santa Barbara County for a period of nine months on the third count of the information herein, and imposed a fine of Five Hundred Dollars on the first count of the information herein, and a fine of Five Hundred Dollars on the second count of the information herein.

Thereafter the defendant served and filed within the time required by law, and in the manner required by law, his petition for Writ of Error which said petition was filed on the 3d day of May, 1922.

That, thereafter, on the 3 day of May, 1922, the defendant prepared, served and filed, his Assignment of Errors.

That said Bill of Exception contains all of the evidence, received and heard by the court in the said case and contains the proceedings in the trial of said cause as aforesaid, and same is hereby settled and allowed this 5th day of July, 1922.

Trippet

District Judge.

It is stipulated that the within Bill of Exceptions contains all of the evidence received and heard by the court in said case and contains the proceedings in the trial of said cause as aforesaid.

J. C. BURKE,
U. S. District Attorney
BY John R Layng

Assistant U. S. District Attorney

Leo V Youngworth

Harry J McClean

Attorneys for Appellant.

Received copy of the within proposed Bill of Exceptions this 30th day of June, 1922.

J. C. BURKE,
U. S. District Attorney
BY John R Layng

Assistant U. S. District Attorney

[Endorsed]: #3404 Cr. IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant. BILL OF EXCEPTION FILED JUL 6 - 1922 at — Min. past — o'clock — M CHAS. N. WILLIAMS, Clerk Murry E. Wire Deputy

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant.	No. 3404 Criminal ASSIGNMENT OF ERROR AT LAW

The defendant in this action in connection with his petition for a writ of error makes the following assignment of errors which he avers occurred on the trial of the cause, to -wit:

I.

The court erred in using the following language in the charge to the Jury: "Now Gentlemen, the law requires in every criminal case that the defendant be proven guilty beyond a reasonable doubt. I have heretofore explained, I presume, to every one of you what reasonable doubt means, and that applies to this case as well as every other criminal case."

II.

The court erred in using the following language in the charge to the Jury: "Gentlemen, if you find that

this defendant kept intoxicating liquors in the place he had there as a soft drink place, in violation of the law; that is to say, if he kept these things there for beverage purposes, if he kept them there unlawfully, if it was not liquor that was acquired before the law went into effect, and if that place was not his residence he would be maintaining a nuisance, and would be guilty under the third charge in this information."

III.

The court erred in using the following language in the charge to the jury: "The Government permits the use of certain intoxicating liquors to be mixed with cordials, but the alcoholic content is kept below one-half of one percent, and these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down."

IV.

The court erred in using the following language in the charge to the jury: "The burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used."

V.

The court erred in admission of evidence offered by the plaintiff in the following instance, to-wit:

In the testimony given by Hubert Frank Manton, a witness produced on behalf of the plaintiff, who testified that he saw a large number of empty bottles, medicine and bitters bottles in the rear of the defend-

ant's place of business, altogether about twenty cases or more.

VI.

The court erred in entering judgment upon the verdict for the reason that the evidence is insufficient to sustain the verdict.

WHEREFORE, the defendant prays that the judgment of the District Court may be reversed.

Leo V. Youngworth
Harry J. McClean
Attorneys for defendant.

[Endorsed]: Cr. 3404-S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant. ASSIGNMENT OF ERROR AT LAW FILED MAY 3 - 1922 at — min. past — o'clock — M. CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy HARRY J. McCLEAN 602 Mer. Nat'l Bk. Bldg., Los Angeles Attorney for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant.	No. 3404 Criminal PETITION FOR WRIT OF ERROR AT LAW.

And now comes Lou Raffour, defendant herein, and says that on or about the 27th day of March, 1922, this court entered judgment herein against the defendant, whereby the defendant was sentenced to imprisonment in the County Jail of Santa Barbara County for a period of nine months on the third count of the information herein, and to pay a fine of Five Hundred Dollars ($500.00) on the first count of the information herein and a fine of Five Hundred Dollars ($500.00) on the second count of the information herein; and in which said judgment and the proceedings had thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States District Court for the Southern District of California, Southern Division, to the Circuit Court of Appeals for the Ninth Circuit, for the many errors so complained of and that a transcript of the record, proceedings and papers in this cause duly authenticated, may be sent to the Circuit Court of Appeals.

Leo V Youngworth
Harry J McClean
Attorneys for Defendant.

[Endorsed]: Cr. 3404 S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff. vs. LOU RAFFOUR, Defendant. PETITION FOR WRIT OF ERROR AT LAW FILED MAY 3 - 1922 at —min. past —o'clock —M CHAS. N. WILLIAMS Clerk Murray E Wire Deputy HARRY J. McCLEAN 602 Mer. Nat'l Bk. Bldg. Los Angeles. Attorney for Defendant. M-2896

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant.	No. 3404 Criminal ORDER

This 3rd day of May, 1922, came the defendant, by his attorneys, and filed herein and presented to the court his petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises, in consideration whereof, the court does allow the writ of error upon the defendant giving bond according to law in the sum of $1000.00 which shall operate as a supersedeas bond, and upon the de-

fendant giving bond according to law in the further sum of $250.00 for costs.

Trippet
District Judge

Approved as to form as provided in Rule 45,
J. C. BURKE,
U. S. District Attorney,
By Mack Meader
Ass't. U. S. District Attorney

[Endorsed]: Cr. 3404 S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant. ORDER FILED MAY-4, 1922 at —min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy HARRY J. McCLEAN 602 Mer. Nat'l Bk. Bldg. Los Angeles. Attorney for Defendant.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant.	No. 3404 Criminal SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS: That we Lou Raffour, and Adrian Raffour as principal, and cash, and liberty bonds as sureties, jointly and severally acknowledge ourselves indebted to the United States of America in the sum of Twelve Hundred and fifty ($1250.00) Dollars, lawful money of the United States of America, which we have deposited herewith, upon the following conditions:

WHEREAS, the said Lou Raffour has sued out a writ of error in judgment of the District Court of the United States, for the Southern District of California, Southern Division, in the case in said court wherein the United States of America are plaintiffs, and the said Lou Raffour is defendant, for review of said judgment in the United States Circuit Court of Appeals for the Ninth Circuit.

Now, if the said Lou Raffour shall appear and surrender himself in the District Court of the United

States, for the Southern District of California, Southern Division, on and after the filing in the said District Court of the mandate of the said Circuit Court of Appeals and from time to time thereafter as he may be required to answer any further proceedings and abide by and perform any judgment or order which may be had or rendered therein in this case and shall abide by and perform any judgment or order which may be rendered in the said United States Circuit Court of Appeals for the Ninth Circuit and not depart from said District Court without leave thereof, then this obligation shall be void; otherwise, to remain in full force and virtue.

WITNESS our hands and seals this 3rd day of May, A. D. 1922.

Lou Raffour. (SEAL)
A. Raffour,
Adrian Raffour.

Subscribed and sworn to before me this 3 day of May, 1922.

Chas. N. Williams, Clerk
U. S. District Court, Southern District of California.
(Seal) By R S Zimmerman Deputy

Taken and approved this 4 day of May, 1922, before me.

Oscar A Trippet
District Judge.

Examined and recommended for approval as provided in Rule 29.

Leo V Youngworth
Atty at Law

O K.
Mack Meader
Asst. U. S. Atty.

[Endorsed]: Cr. 3404—S. D. IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant. SUPERSEDEAS BOND FILED MAY—4 1922 at —min. past —o'clock —M CHAS. N. WILLIAMS, Clerk Murray E Wire Deputy HARRY J. McCLEAN 602 Mer. Nat'l Bk. Bldg. Los Angeles Attorney for Defendant.

UNITED STATES OF AMERICA DISTRICT COURT OF THE UNITED STATES SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. LOU RAFFOUR, Defendant.	Clerk's Office No. Cr. 3404, S. D. PRAECIPE

TO THE CLERK OF SAID COURT:

Sir:

Please prepare and make return to the writ of error herein and make copies of the following papers on file in your office:

1. The information in full;
2. The minutes of trial including verdict;
3. Judgment;
4. Bill of exceptions;
5. Assignment of errors;
6. Petition for writ of error;
7. Order granting writ of error;
8. Citation on writ of error;
9. Writ of error;
10. Supersedeas bond;

11. Bond for costs;

12. Praecipe.

Certify to this record and return with the original writ of error.

Dated this 12 day of May, 1922.

Leo V Youngworth
Harry J McClean
Attorneys for Plaintiffs in Error.

Service of the within praecipe admitted this 31 day of May, 1922

Joseph C Burke

U. S. District Attorney
By John R Layng

Ass't. U. S. District Attorney

[Endorsed]: No. 3404. S. D. UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA UNITED STATES OF AMERICA, Plaintiff vs. LOU RAFFOUR, Defendant PRAECIPE for Record of proceedings in error FILED JUN 16, 1922 at —min. past —o'clock —M CHAS. N. WILLIAMS Clerk Murray E Wire Deputy

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

United States of America,	)	
	)	
Plaintiff,	)	
vs.	)	Clerk's
	)	Certificate.
Lou Raffour, charged as Lou Taffour,	)	
	)	
Defendant.	)	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 48 pages, numbered from 1 to 48 inclusive, to be the Transcript of Record on Writ of Error in the above entitled cause, as printed by plaintiff in error and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, writ of error, information, minutes of the court and judgment, bill of exceptions, assignment of error, petition for writ of error, order, supersedeas bond and bond on appeal, praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Writ of Error amount to and that said amount has been paid me by the herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of July, in the year of our Lord One Thousand Nine Hundred and Twenty-one, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lou Raffour, Charged as Lou Taffour,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF BY PLAINTIFF IN ERROR.

LEO. V. YOUNGWORTH,
HARRY J. MCCLEAN,
Attorneys for Plaintiff in Error.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lou Raffour, Charged as Lou Taffour,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF BY PLAINTIFF IN ERROR.

The plaintiff in error was convicted on information containing three counts, charging him with unlawful possession and unlawfully maintaining a common nuisance. A jury returned a verdict of guilty on each of the three counts. [Tr. p. 15.] He was fined the sum of five hundred dollars ($500.00) on the first count, charging unlawful possession and a fine of five hundred dollars ($500.00) on the second count, charging unlawful possession and sentenced to a period of nine (9) months in the county jail of Santa Barbara county on the third count of the information. The plaintiff in error complains that the court erred in instructing the jury as follows:

"Now, gentlemen, the law requires in every criminal case that the defendant be proven guilty beyond a reasonable doubt. I have heretofore explained, I presume, to every one of you what reasonable doubt means, and that applies to this case as well as every other criminal case." An examination of the instruction [Tr. pp. 25-33] reveals that the court did not instruct the jury on the rule of reasonable doubt, nor did the court instruct the jury concerning the presumption of innocence.

It is elemental that the presumption of innocence is evidence in favor of the accused and is treated as evidence giving rise to proof to the full extent. In a leading and well considered case, the United States Supreme Court has held that it is reversible error for a court to fail to instruct the jury concerning the presumption of innocence. (Coffin v. U. S., 156 U. S. 432.) This presumption is a conclusion drawn by the law in favor of the citizen and it devolves upon the court in a criminal case to instruct the jury concerning this presumption of law. In the case last referred to (Coffin v. U. S., *supra*) the court said, "Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty." In other words, this presumption is an instrument of proof created by the law in favor of an accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has

created. This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn.

It will be observed that the charge of the court in the case at bar is silent on these two most important and elementary principles of criminal jurisprudence, and the defendant is left without the protection which the law gives to an accused by presuming his innocence until his guilt is established beyond a reasonable doubt.

The plaintiff in error submits that the court erred in instructing the jury as follows:

"Gentlemen, if you find that this defendant kept intoxicating liquirs in the place he had there as a soft drink place, in violation of the law; that is to say, if he kept these things there for beverage purposes, if he kept them there unlawfully, if it was not liquor that was acquired before the law went into effect, and if that place was not his residence, he would be maintaining a nuisance and would be guilty under the third charge in this information." The vice of this instruction is that it does not fully or correctly define for the jury what constitutes a common nuisance under the law. Section 21 of the National Prohibition Act reads as follows:

> "Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept or bartered in violation of this title, and all intoxicating liquor and property

kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both. If a person has knowledge or reason to believe that his room, house, building, boat, vehicle, structure, or place is occupied or used for the manufacture or sale of liquor contrary to the provision of this title, and suffers the same to be so occupied or used, such room, house, building, boat, vehicle, structure, or place shall be subject to a lien for and may be sold to pay all fines and costs assessed against the person guilty of such nuisance for such violation, and any such lien may be enforced by action in any court having jurisdiction."

It is apparent that the proper construction of such provision of the law is that a common nuisance consists in the maintaining of a place where intoxicating liquor is manufactured, sold or bartered and not the keeping for beverage purposes. Obviously, if the place were his residence, it would not be a common nuisance to keep intoxicating liquor legally at his residence "for beverage purposes." Therefore, the jury was not advised by the court in the instruction complained of, of what a common nuisance consists. (U. S. v. One Cadillac Touring Car, 274 Federal 470.)

The plaintiff in error complains of the following instruction:

"The government permits the use of certain intoxicating liquors to be mixed with cordials, but the alco-

holic content is kept below one half of one per cent, and these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down."

The plaintiff in error complains of this instruction because it is pregnant with insinuation of the guilt of the defendant. It is clearly cast in very unfortunate phraseology. It might well be construed by a jury that in the opinion of the court the defendant was guilty. An instruction somewhat analogous to the one complained of was condemned by the court in the case of the State v. Cater, 100 Ia. 501, 69 North N. W. 880. In the latter case the trial court gave the following instruction:

> "The defendant here sets up no affirmative defense and no matters in extenuation. He relies wholly upon the denial of his guilt, and upon his anticipation of a failure bv the state to prove a case against him."

In criticizing this instruction, the court said:

> "The instruction impresses us as pregnant with insinuation of the guilt of the defendant and manifestly unfair in its phraseology."

The plaintiff in error objects to the following instruction by the court: "The burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed and used." This instruction follows the phraseology of the law. The instruction should read

that when the court instructs that the burden of proof is on the defendant, it means that the evidence must be sufficient to raise a reasonable doubt of the defendant's guilt. (Jarvis v. State, 138 Ala. 17, 34 So. 1025.) In other words, it must first be established beyond a reasonable doubt by such evidence as rebuts the presumption of innocence that the accused had in his possession contraband liquor. Then, and not until then, does the burden of proof shift to the defendant for him to explain the lawful character of such possession. (Coffin v. U. S., 156 U. S. 432 at 461.)

It is submitted that the error complained of by the plaintiff in error, constitutes reversible error and that by reason of the failure of the court to give to the accused the benefit of the instruction concerning the presumption of innocence and the rule of reasonable doubt, the rights of the defendant below were prejudiced. Also the failure of the court to clearly or correctly define what constitutes common nuisance within the meaning of the law made it so unlikely that the jury could determine such fact as to constitute reversible error. Further, it is submitted, in fact, all of the error complained of is of such a serious character as to render necessary a reversal of the judgment of conviction. It will be noted that trial counsel for the plaintiff in error saved no exceptions. It is of course well established that the Circuit Court of Appeals will review the record where no exceptions are reserved or proceedings had to correct the error in the District Court in a similar case, where the life

or liberty of a person is at stake and the court will not sit by and allow error to prejudice the rights of an accused even though no technical exceptions are reserved at the time. (Sykes v. U. S., 204 Fed. 909; Humes v. U. S., 182 Fed. 485; Fielder and Others v. U. S., 227 Fed. 832; Gillette v. U. S., 236 Fed. 215; Clyatt v. U. S., 197 U. S. 207; Crawford v. U. S., 213 U. S. 183; Wiborg v. U. S., 163 U. S. 632; Pettine v. Territory of New Mexico, 201 Fed. 489.)

Moreover, there is the legal presumption that error produces prejudice, and it is only when it appears so clear as to be beyond doubt that the error challenged did not prejudice and could not have prejudiced the complaining party that the rule, that error without prejudice is no ground for reversal, is applicable. (Ayer v. Territory of New Mexico, 201 Fed. 497.)

We submit that the judgment of conviction should be reversed as to all of the counts ,and we so pray.

Respectfully submitted.

LEO. V. YOUNGWORTH,

HARRY J. MCCLEAN,

Attorneys for Plaintiff in Error.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lou Raffour,
Plaintiff in Error.
vs.
United States of America,
Defendant in Error.

BRIEF OF RESPONDENT IN ERROR.

JOSEPH C. BURKE,
United States District Attorney;
JOHN R. LAYNG,
Special Assistant United States District Attorney.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Lou Raffour,
Plaintiff in Error.
vs.
United States of America,
Defendant in Error.

BRIEF OF RESPONDENT IN ERROR.

No question whatever is raised on this appeal as to the sufficiency of the evidence to sustain and support the verdict of the jury rendered in this case. The only points presented by the brief of the plaintiff in error consist of the assertion that the trial court committed error in *failing* to give certain instructions, although there were no requests therefore; that certain other instructions constitute an erroneous statement of the law; and that this court will review the alleged errors although no exceptions were taken or reserved at the trial.

I.

The first point presented was that the trial court committed reversible error in failing to instruct the jury on the law concerning the presumption of innocence even without a request therefor.

In support of this contention the plaintiff in error cites the case of Coffin v. United States, 156 U. S. 432. A careful examination of this decision, however, shows that it does not sustain the point made, for the reason that it appears on page 452 of the opinion that the trial court *requested* and *refused* to give the instruction there set out covering the law as to the presumption of the defendant's innocence of the crime charged.

The court states the proposition before it on page 457 as follows:

"This presents the question whether the charge that there cannot be a conviction unless the proof shows guilt beyond a reasonable doubt, so entirely embodies the statement of presumption of innocence *as to justify the court in refusing, when requested,* to inform the jury concerning the latter." (Italics ours.)

There is no intimation in this that it would constitute error on the part of the trial court in failing to give this instruction although no request is made therefor. Nor has our attention been called to any case so holding. On the contrary:

> "It is no ground for reversal that the court omitted to give any particular instructions, where they were not requested by the defendant."

Humes v. U. S., 170 U. S. 210-211;
Isaacs v. U. S., 159 U. S. 487-491;
Ripper v. U. S., 179 Fed. 498;
Sprinkle v. U. S. 141 Fed. 820;
Goldsby v. U. S., 160 U. S. 70-77;
Hughes v. U. S., 231 Fed. 53;
Schultz v. U. S., 200 Fed 239;
16 Corpus Juris, 1056, Sec. 2498.

"Nor are instructions which were given but not excepted to subject to review."

Humes v. U. S., 170 U. S. 210-212;
Tucker v. U. S., 151 U. S. 164;
St. Clair v. U. S., 154 U. S. 134-153.

"It is not necessary for the court in its instructions to define or explain the words 'reasonable doubt,' and, at least in the absence of a request by the defense, a failure to define reasonable doubt is not error"

12 Cyc. 623;
16 Corpus Juris, 1057, Sec. 2498;
People v. Christensen, 85 Cal. 568-571;
People v. Gray, 66 Cal. 271-277;
People v. Hawn, 44 Cal. 96;
People v. Ah Wee, 48 Cal. 236;
U. S. v. Monongahela Bridge Co., 160 Fed. 712.

II.

The plaintiff in error asserts that the trial court did not properly instruct the jury as to what con-

stitutes a nuisance under section 21 of the National Prohibition Act.

There is no merit in this contention whatever. The transcript shows on page 32 that the court read to the jury the definition of a nuisance from section 21 of the National Prohibition Act.

That part of the court's instruction quoted on page 5 of the plaintiff's brief is merely the court's application of the definition to the undisputed facts of the case. The plaintiff would seem to predicate error on the omission of the court to point out that "if the place were his residence, it would not be a common nuisance to keep intoxicating liquor * * * 'for beverage purposes.'" The answer to this is that we are not dealing with a situation where intoxicating liquor was kept in a dwelling or residence.

The case of United States v. One Cadillac Touring Car, 274 Fed. 470, is not an authority on any question raised on this record.

III.

The third instruction complained against is that the instruction reading:

"The government permits the use of certain intoxicating liquors to be mixed with cordials, but the alcoholic content is kept below one-half of one per cent, and these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down."

"is pregnant with insinuation of the guilt of the defendant."

This contention is without merit, and requires no argument to refute it, as there was no evidence offered whatever that the defendant had ever applied for any such permit.

The trial judge in the above-quoted part of his charge was merely explaining and elucidating section 69 of the Federal Prohibition Commissioner's Regulations adopted January 16th, 1920, which he had just finished reading. This and other sections read govern the issuance of permits to retail druggists, pharmacists, etc. He prefaces the whole of the foregoing statement by the words, "That is to say * * *." and the words of the charge that "these permits are to be given to people who are supposed to be responsible and will keep such alcoholic content down" are entirely impersonal in their character and cannot be said to reflect against or prejudice this particular defendant in any way. To contend seriously that this language "might well be construed by a jury that in the opinion of the court the defendant was guilty" is to hold the intelligence of the men who sat in the jury box on this trial in low esteem. The contention is wholly without merit.

IV.

The fourth point presented is that the instruction reading:

"The burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired possessed and used"

should have been stated in other language; that it should have been worded to say:

"That when the court instructs that the burden of proof is on the defendant, it means that the evidence must be sufficient to raise a reasonable doubt of the defendant's guilt."

In advancing this point the plaintiff's attorneys have manifestly overlooked the plain provisions of section 33 of title II, which was read in full to the jury as a part of the court's instruction [Tr. p. 31]; to the effect that proof of the possession of intoxicating liquors in any other place than a private dwelling constitutes a *prima facie* case of a violation of the terms of the act; that if the defendant should contend that his possession is lawful under some one of the regulations and provisions of the act, he then has the burden of proving it.

V.

While readily admitting that no requests were made for any instructions, and no exceptions taken or reserved to any part of the court's charge, the plaintiff in error invokes the rule announced in Crawford v. U. S., 212 U. S. 183-194, that,

> "In criminal cases courts are not inclined to be as exacting, with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception."

But the answer to this is, as we have heretofore pointed out, that under the law laid down by the adjudged cases, no errors have been shown on this record; besides, the case presented does not require the exercise of this extraordinary authority. The record shows that undisputed evidence clearly indicates the defendant's guilt of all the charges contained in the information, and that the plaintiff in error had a fair and impartial trial in every respect.

We therefore ask that the judgment be affirmed.

Respectfully submitted,

JOSEPH C. BURKE,

United States District Attorney;

JOHN R. LAYNG,

Special Assistant United States District Attorney.

No. 3911

United States

Circuit Court of Appeals

For the Ninth Circuit.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICH-ELDERFER and W. N. MORSE,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3911

United States

Circuit Court of Appeals

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FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

Names and Addresses of the Attorneys of Record.

C. L. PEPPER,
The Dalles Oregon, and
HORACE M. STREET,
709 Hobart Building, San Francisco, California, for the Plaintiff in Error.
JOSEPH, HANEY & LITTLEFIELD,
Corbett Building, Portland, Oregon, and
PLOWDEN STOTT,
Yeon Building, Portland, Oregon,
for the Defendants in Error

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medlar, A. D. Richelderfer and W. N. Morse, Defendants in Error, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the ——District of OREGON, —— wherein — First National Bank of Antioch, a corporation is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ————, United States District Judge for the District of Oregon this 2d day of August, A. D. 1922.

R. S. BEAN,
United States District Judge. [1*]

DUE SERVICE and receipt of a copy of the within Citation is hereby admitted this 2d day of August, 1922.

E. V. LITTLEFIELD,
Of Attorneys for Defendants in Error.

[Endorsed]: No. L–8886. United States District Court for the District of Oregon, First National Bank of Antioch, a Corporation, Plaintiff in Error, vs. R. H. McKean et al., Defendants in Error. Citation on Writ of Error. U. S. District Court, Dis-

*Page-number appearing at foot of page of original certified Transcript of Record.

trict of Oregon. Filed Aug. 2, 1922. G. H. Marsh, Clerk.

Writ of Error.

UNITED STATES OF AMERICA,—ss:

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the District of Oregon, GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between First National Bank of Antioch, a corporation, Plaintiff in Error, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medlar, A. D. Richelderfer and W. N. Morse, Defendants in Error, a manifest error hath happened, to the great damage of the said First National Bank of Antioch, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in

the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 2d day of August, in the year of our Lord One Thousand, Nine Hundred and Twenty-two.

[Seal] G. H. MARSH,

Clerk of the United States District Court for the District of Oregon.

Allowed by:

_____,

_____,

[2]

DUE SERVICE and receipt of a copy of the within writ of error is hereby admitted this 2d day of August, 1922.

E. V. LITTLEFIELD,

Of Attorneys for Defendants in Error.

[Endorsed]: No. L–8886. United States District Court for the District of Oregon. First National Bank of Antioch, a Corporation, Plaintiff in Error, vs. R. H. McKean et al., Defendants in Error. Writ of Error. U. S. District Court, District of Oregon. Filed Aug. 2, 1922. G. H. Marsh, Clerk. (Form No. 60.)

In the District Court of the United States for the District of Oregon.

November Term, 1921.

BE IT REMEMBERED, That on the 16th day of January, 1922, there was duly filed in the District Court of the United States for the District of Oregon, a complaint in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

No. L–8886—AT LAW.

Action on a Bond.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICH-ELDERFER and W. N. MORSE,

Defendant.

Complaint.

Plaintiff complains of the defendants and for cause of action alleges;

I.

That plaintiff at all of the times herein mentioned was, and now is, a corporation duly organized and existing under the laws of the United States of

America as a National Banking Association; that it has its only place of business in the Town of Antioch in the State of California and is a citizen and resident of the State of California.

II.

That each of the defendants, at all of the times herein mentioned was and now is a citizen and resident of the County of Sherman, State of Oregon, and of the said District of Oregon.

III.

That on the 25th day of November, 1919, Plaintiff commenced an action against one H. B. Thornberry in the Circuit Court of the State of Oregon in and for the County of Sherman, to recover from said H. B. Thornberry the sum of $12,906.08, with interest and costs, and for the further sum of $1,660.00 as attorneys' fees, upon a contract for the direct payment of money, and, on said 25th day of November, 1919, a Writ of Attachment [4] was issued out of said Court in said action and was, on said day, by the Sheriff of said Sherman County, levied upon all of the real property of the said H. B. Thornberry in the said Sherman County, State of Oregon, viz.: upon about 2000 acres of farm lands.

IV.

That on the 17th day of January, 1920, the said H. B. Thornberry, having theretofore appeared in said action, applied to said court for a release and discharge of the attachment and delivered to the Judge of said court and filed in said action a bond or undertaking duly signed, sealed and executed by

said defendants and each of them in words and figures as follows;

In the Circuit Court of the State of Oregon for Sherman County.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

H. B. THORNBERRY,

Defendant.

UNDERTAKING TO DISCHARGE ATTACHMENT.

WHEREAS, the above-named plaintiff has commenced an action against the above-named defendant in the above-entitled Court upon an alleged contract for the direct payment of money, claiming therein that there is due and owing to plaintiff from defendant the sum of $12,900.00 and interest and attorney fees, aggregating approximately $15,000.00, and

WHEREAS, P. H. Buxton, Sheriff of Sherman County, Oregon, by virtue of a writ of attachment issued in said Court and cause, has attached certain property of defendant's, to wit, all the real property owned by the said defendant in said Sherman County, Oregon, and said defendant having applied to the said Court, upon due notice to the plaintiff, for an order to discharge said attachment and to release said property from the lien thereof, in com-

pliance with Sections 310 and 311, Lord's [5] Oregon Laws,

Now, therefore, in consideration of the premises, and for the purpose of making of said order, we, the undersigned, H. B. Thornberry, as principal, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer and W. N. Morse, Residents and freeholders in said County and State, as sureties, undertake, on behalf of defendant, and are bound to the plaintiff in the sum of $15,000.00, and promise the plaintiff that, in case the plaintiff recover judgment in said action, the defendant will, or in default thereof, we, his sureties, will on demand, pay to the plaintiff the amount of the judgment that he may recover against the defendant in said action, not exceeding the amount of $15,000.00 and the costs and disbursements of said action.

Dated at Wasco, Oregon, this 17th day of January, 1920.

H. B. THORNBERRY. (Seal)
R. H. McKEAN.
GEO. N. CROSFIELD.
C. B. HEARING.
W. A. MEDLER. (Seal)
A. D. RICHELDERFER. (Seal)
W. N. MORSE. (Seal)

State of Oregon,
County of Sherman,—ss.

We, H. B. Thornberry, R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Rich-

elderfer and W. N. Morse, whose names are subscribed to the within undertaking as sureties, being severally duly sworn, each for himself says: That I am a resident and freeholder within the County of Sherman and State of Oregon, and am worth the sum of Fifteen Thousand Dollars over and above all debts and liabilities, and exclusive of property exempt from execution, and further that I am not a counselor or attorney at law, sheriff, clerk, or other officer of the Court

H. B. THORNBERRY.
R. H. McKEAN.
W. A. MEDLER.
GEO. N. CROSFIELD.
A. D. RICHELDERFER.
C. B. HEARING.
W. N. MORSE. [6]

Subscribed and sworn to before me this 17th day of January, 1920.

J. M. MORRISON,
Notary Public for Oregon.

My commission expires October 31, 1921.

V.

That upon the giving and filing of said bond or undertaking in said action the said Circuit Court of Sherman County made its order discharging the said attachment and the said property of the said defendant was thereupon released and discharged therefrom.

VI.

That on the 12th day of January, 1922, plaintiff

recovered a judgment against said H. B. Thornberry in said action for the sum of $13,902.50.

VII.

That the said H. B. Thornberry defaulted in payment of said judgment and has not paid the same or any part thereof.

VIII.

That after the said default of said H. B. Thornberry and prior to the commencement of this action plaintiff demanded payment of said judgment from said defendants and each of them. That defendants and each of them have failed, neglected and refused to pay plaintiff the said sum of $13,902.50, the amount of said judgment as aforesaid, or any part thereof.

WHEREFORE plaintiff prays judgment in its favor and against said defendants and each of them for the sum of $13,902.50 with interest thereon at the rate of six per cent per annum from January 12, 1922 and for its costs and disbursements herein incurred. [7]

C. L. PEPPER,
The Dalles, Oregon,
HORACE M. STREET,
709 Hobart Building,
San Francisco, California,
Attorneys for Plaintiff.

State of Oregon,
County of Multnomah,—ss.

Horace M. Street, being first duly sworn deposes and says that he is the attorney and agent for the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true as he verily believes. That he makes this affidavit of verification on behalf of the said plaintiff for the reason that none of the officers of the plaintiff are within the State and District of Oregon and for the further reason that he is more fully informed as to the facts stated in said complaint than any of the officers of the plaintiff.

HORACE M. STREET.

Subscribed and sworn to before me this 16th day of January, 1922.

[Seal] M. A. HENLEY,
Notary Public for Oregon.

My commission expires January 5, 1924.

Filed January 16, 1922. G. H. Marsh, Clerk. [8]

AND AFTERWARDS, to wit, on the 21st day of February, 1922, there was duly filed in said Court, a demurrer to complaint, in words and figures as follows, to wit: [9]

In the District Court of the United States for the District of Oregon.

No. 8886.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants.

Demurrer.

Come now the above-named defendants and demur to the complaint of plaintiff on the file herein on the grounds and for the reasons as follows, to wit:

(a) That the Court has no jurisdiction of the person of the defendants, or the subject of the action.

(b) That the plaintiff has not legal capacity to sue.

(c) That the complaint does not state facts sufficient to constitute a cause of action.

JOSEPH, HANEY & LITTLEFIELD,
Attorneys for Defendants, All of Portland, Oregon.

To First National Bank of Antioch, and To C. L. Pepper and Horace M. Street, its Attorneys:

I hereby certify that in my opinion the above demurrer is well founded in law.

PLOWDEN STOTT,
Of Attorneys for Defendants. [10]

State of Oregon,
County of Multnomah,—ss.

I, Plowden Stott, being first duly sworn to depose and say due and legal service of the within demurrer was made by me depositing in the Post-office at Portland, Oregon, a copy of said demurrer duly certified by me as such and addressed to C. L. Pepper, Attorney at Law, The Dalles, Oregon.

PLOWDEN STOTT.

Subscribed and sworn to before me this 21st day of February, 1922.

[Seal] WM. W. BANKS,
Notary Public for Oregon.

My commission expires June 17, 1922.

Filed February 21, 1922. G. H. Marsh, Clerk. [11]

AND AFTERWARDS, to wit on Monday, the 10th day of April, 1922, the same being the 21st judicial day of the Regular March term of said Court. Present the Honorable ROBERT S. BEAN, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [12]

In the District Court of the United States, for the District of Oregon.

No. L–8886.

FIRST NATIONAL BANK OF ANTIOCH,

vs.

R. H. McKEAN, et al.

April 10, 1922.

Minutes of Court—April 10, 1922—Order Sustaining Demurrer and Judgment for Defendants.

This cause was heard by the Court upon the demurrer of defendants to the complaint herein, and was argued by Mr. C. L. Pepper, of counsel for plaintiff, and by Mr. Plowden Stott and Mr. E. V. Littlefield, of counsel for defendants. Upon consideration whereof

IT IS ORDERED that said demurrer be and the same is hereby sustained, that said complaint be and the same is hereby dismissed, that plaintiff take nothing by this action and that said defendants do have and recover of and from said plaintiff their costs and disbursements herein, taxed in the sum of $10.50 and that said defendants have execution therefor. [13]

AND AFTERWARDS, to wit, on the 24th day of July, 1922, there was duly filed in said Court, a petition for writ of error, in words and figures as follows, to wit: [14]

In the District Court of the United States, for the District of Oregon.

No. L–8886—AT LAW.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICH-ELDERFER and W. N. MORSE,

Defendants.

Petition for Writ of Error.

Now comes First National Bank of Antioch, plaintiff in the above-entitled action, by its attorney and respectfully shows that on the 10th day of April, 1922, a final judgment was entered in the above-entitled action in favor of the defendants and against the plaintiff herein, viz: a judgment dismissing said action upon the sustaining of defendants' demurrer to plaintiff's complaint.

YOUR PETITIONER, feeling itself aggrieved by the said judgment hereby petitions for an order allowing it to prosecute a WRIT OF ERROR to the United States Circuit Court of Appeals, Ninth Circuit, under the laws of the United States, in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a Writ of Error in this behalf to the United States Circuit Court of Appeals,

Ninth Circuit, sitting in the City and County of San Francisco, State of California, in said Circuit, for the correction of error committed by said District Court, in the sustaining of said demurrer and the entering of the said judgment as aforesaid, for the reasons set forth in your petitioner's assignment of errors filed herewith, and that a transcript of the record, proceedings and papers upon which said judgment was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, Ninth Circuit.

HORACE M. STREET,
Attorney for Plaintiff.

Filed July 24, 1922. G. H. Marsh, Clerk. [15]

AND AFTERWARDS, to wit, on the 24th day of July, 1922, there was duly filed in said Court, an assignment of errors, in words and figures as follows, to wit: [16]

In the District Court of the United States, for the District of Oregon.

No. L–8886—AT LAW.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants.

Assignment of Errors.

NOW COMES THE PLAINTIFF in the above-entitled action and files the following assignment of errors upon which it will rely in the prosecution of its Writ of Error to review a final judgment entered against it in said action on the 10th day of April, 1922, viz.: a judgment dismissing said action entered upon the sustaining of the defendants' demurrer to the plaintiff's complaint:

1. That the District Court erred in holding the bond or undertaking set forth in plaintiff's complaint to be in compliance with Section 311, Oregon Laws, in this: said Section 311 provides that the bond given to release property from attachment must be "to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action," while the bond or undertaking herein involved provides that "in case the plaintiff recover judgment in said action the defendant will, or in default thereof, we his sureties, will, on demand, pay to the plaintiff the amount of the judgment that he may recover against the defendant in the action."

2. That the District Court erred in holding that, the bond being sufficient for the State Court to order the release of the property of Thornberry from the lien of the attachment, that therefore, it was an undertaking upon which judgment, under Section 308, Oregon Laws, could have been given [17] against the sureties at the time judgment was

entered against the defendant in the action against said Thornberry.

3. That the District Court erred in holding, that, because judgment was not entered against the defendants herein at the time judgment was entered against Thornberry in the action in the Circuit Court of Sherman County, State of Oregon, that the plaintiff lost its right to demand in this, or in any court of competent jurisdiction, judgment for the amount of plaintiff's judgment against said Thornberry which defendants contracted to pay to plaintiff, upon demand, in consideration of the release of Thornberry's property from the attachment.

4. That the District Court erred in holding that the said bond was not a valid contractual or common law obligation, against the defendants.

5. That the District Court erred in holding said bond or undertaking to be a statutory Obligation.

6. That the District Court erred in holding that plaintiff had the right to enter a judgment against defendants upon said undertaking in the action wherein the same was given, under Section 308, Oregon Laws.

7. That the District Court erred in holding that plaintiff's sole remedy upon said bond was in the action wherein the same was given, and under said section 308, Oregon Laws.

8. That the District Court erred in holding that the failure of plaintiff to cause judgment to be entered against defendants, in the action wherein

said bond was given, released the defendants from liability thereon.

9. That the District Court erred in holding that plaintiff has not a right of action against defendants upon said bond, independently of the remedy provided by Section 308, Oregon Laws, whether or not said bond complies with Section 311, Oregon Laws.

10. That the District Court erred in holding plaintiff [18] barred from maintaining this action in this:

a. That plaintiff could not have had judgment in the action wherein said bond was given against the defendants for the reason that bond is not in compliance with Section 311, Oregon Laws.

b. That said bond, not being in compliance with said Section 311, plaintiff had a right of action against defendants upon said bond as a common-law obligation.

c. That said bond, not being in compliance with said section 311, is a contract between plaintiff and defendants based upon a valuable consideration, viz.: the release of the lien of plaintiff's attachment.

d. That said bond or undertaking is a contract between plaintiff and defendants whether or not it is in compliance with said section 311, Oregon Laws.

11. That the District Court erred in holding that plaintiff's complaint does not state facts sufficient to constitute a cause of action, for the reasons set forth in paragraphs 1 to 10 hereof.

12. That the District Court erred in holding that plaintiff has no capacity to sue, in this: it appears from the complaint that plaintiff is a National Bank, duly organized and existing under the laws of the United States, doing business solely in California; that the defendants are each residents of Oregon and, that the amount in controversy is more than $3,000.00.

13. That the District Court erred in holding that it had no jurisdiction of the persons of the defendants for the reasons set forth in paragraph 12 hereof.

14. That the District Court erred in holding that it had no jurisdiction of the subject of the action for the reasons set forth in paragraphs 1 to 10 hereof.

WHEREFORE the plaintiff prays that the judgment [19] of the District Court be reversed and the said District Court directed to overrule the defendants' demurrer to plaintiff's complaint.

Dated July 24, 1922.

HORACE M. STREET,
Attorney for Plaintiff.

Filed July 24, 1922. G. H. Marsh, Clerk. [20]

AND AFTERWARDS, to wit, on the 1st day of August, 1922, there was duly filed in said Court, an order allowing writ of error, in words and figures as follows, to wit: [21]

In the District Court of the United States for the District of Oregon.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants.

Order Allowing Writ of Error.

Upon motion of the plaintiff above-named, and upon filing a petition for a writ of error and assignment of errors:

IT IS HEREBY ORDERED that a writ of error be, and it is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered herein on the 10th day of April, 1922, and that a certified transcript of the record, and all proceedings, be forthwith transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the amount of the bond on said writ of error be, and it is hereby fixed at the sum of $300.00.

Dated July 27, 1922.

WM. W. MORROW,

Judge of the United States Circuit Court of Appeals, Ninth District.

Filed August 1, 1922. G. H. Marsh, Clerk. [22]

AND AFTERWARDS, to wit, on the 1st day of August, 1922, there was duly filed in said Court, a bond on writ of error, in words and figures as follows, to wit: [23]

S. F. #31274–22.

In the District Court of the United States for the District of Oregon.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER, and W. N. MORSE,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, First National Bank of Antioch, a corporation, as principal, and United States Fidelity and Guaranty Company, a corporation, having its principal place of business in the city of Baltimore, State of Maryland, and having a paid-up capital of Four Million Five Hundred Thousand Dollars, duly incorporated under the laws of the State of Maryland, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the Laws of the State of Oregon and United States of America respecting such corporations, are held

and firmly bound unto the above-named defendants in the sum of Three Hundred Dollars ($300.00), lawful money of the United States, to be paid to them and their respective executors, administrators and assigns, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our successors, by these presents.

SEALED with our seals and dated this 29th day of July, 1922.

WHEREAS, the above-named plaintiff has prosecuted a writ of error to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the judgment of the District Court of the United States for the District of Oregon, entered herein on [24] April 10, 1922, in the above-entitled action:

NOW THEREFORE, the condition of this obligation is such that if the above-named plaintiff shall prosecute its said writ of error to effect and answer all costs if it fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

[Seal] FIRST NATIONAL BANK OF ANTIOCH.
By HERBERT A. WEST,
Cashier and Secretary.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY.
By HENRY V. D. JOHNS,
By ERNEST W. SWINGLEY,
Attorneys in Fact.

State of California,
City and County of San Francisco,—ss.

On this 29th day of July in the year one thousand nine hundred and twenty-two, before me, W. W. Healey, a Notary Public in and for the City and County of San Francisco, personally appeared Henry V. D. Johns and Ernest W. Swingley, known to me to be the persons whose names are subscribed to the within instrument as the Attorneys in Fact of the United States Fidelity and Guaranty Company, and acknowledged to me that they subscribed the name of the United States Fidelity and Guaranty Company thereto as principal and their own names as Attorneys in Fact.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California.

Filed August 1, 1922. G. H. Marsh, Clerk. [25]

AND AFTERWARDS, to wit, on the 1st day of August, 1922, there was duly filed in said Court, a praecipe for transcript, in words and figures as follows, to wit: [26]

In the District Court of the United States for the District of Oregon.

FIRST NATIONAL BANK OF ANTIOCH, a Corporation,

Plaintiff,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, A. D. RICHELDERFER, W. A. MEDLER and W. N. MORSE,

Defendants.

Praecipe for Transcript of Record on Writ of Error.

WILL YOU PLEASE CERTIFY to the United States Circuit Court of Appeals of the Ninth District the following records and papers herein, to wit:

The plaintiff's complaint.

The defendant's demurrer to plaintiff's complaint.

The judgment and order sustaining defendant's demurrer to plaintiff's complaint and dismissing said action.

Assignment of errors.

Petition for writ of error, order allowing writ of error.

Writ of error and citation.

Bond.

Praecipe.

HORACE M. SWEET,
Attorney for Plaintiff.

Due service and receipt of a copy of the within praecipe is hereby admitted this 2d day of August, 1922.

JOSEPH, HANEY & LITTLEFIELD,
PLOWDEN STOTT,
Attorneys for Defendants.

Filed August 2, 1922. G. H. Marsh, Clerk. [27]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, pursuant to the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages numbered three to twenty-seven inclusive, constitute the transcript of record on writ of error on the cause in said Court, in which the First National Bank of Antioch is plaintiff and plaintiff in error, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer and W. N. Morse are defendants and defendants in error; that the said transcript is a true and complete transcript of the records and proceedings had in said Court and said cause, as the same appears of record and on file at my office and in my custody. And I further certify that I returned to the United States Circuit Court of Appeals for the Ninth Circuit, with the said transcript of record attached, the original Writ of Error issued in said cause and the citation filed therein.

And I further certify that the cost of the foregoing transcript is $7.10, and that the same has been paid by the said plaintiff in error.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said court at Portland in said District this 10th day of August, 1922.

[Seal] G. H. MARSH,
Clerk. [28]

[Endorsed]: No. 3911. United States Circuit Court of Appeals for the Ninth Circuit. First National Bank of Antioch, a Corporation, Plaintiff in Error, vs. R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer and W. N. Morse, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Oregon.

Filed August 14, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH
(a corporation),
Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,
Defendants in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

FRANK W. STREET,
HORACE M. STREET,
Attorneys for Plaintiff in Error.

No. 3911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH (a corporation),

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

OPENING BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the District Court of the United States for the District of Oregon.

Statement of Facts.

Complaint was filed in the District Court on the 16th day of January, 1922. The facts, constituting plaintiff's cause of action against the defendants, as alleged in the complaint are in substance as follows: On the 25th day of November, 1919, in the Circuit Court of the State of Oregon for Sherman County, First National Bank of Antioch, the plaintiff in error, herein, commenced an ac-

tion at law against H. B. Thornberry to recover from him the sum of $12,906.08 with interest and costs, and for the further sum of $1660 attorneys fees, upon contract for the direct payment of money. On said 25th of November, 1919, a writ of attachment was issued out of said court, in said action, and on said day the sheriff of Sherman County, Oregon, levied upon all of the real property of said H. B. Thornberry in said Sherman County, Oregon, viz.: upon about 2000 acres of farm land.

On the 17th day of January, 1920, said H. B. Thornberry, having appeared in said action, applied to the Court for a release and discharge of the said attachment and delivered to the judge of said Court and filed in said action, a bond or undertaking duly executed by all the said defendants in error herein. This undertaking was conditioned as follows:

> "Whereas, P. H. Buxton, Sheriff of Sherman County, Oregon, by virtue of a writ of attachment issued in said court and cause, has attached certain property of defendant's, to wit, all the real property owned by the said defendant in said Sherman County, Oregon, and said defendant having applied to the said Court, upon due notice to the plaintiff, for an order to discharge said attachment and to release said property from the lien thereof, in compliance with sections 310 and 311, Lord's Oregon Laws:
>
> Now, therefore, in consideration of the premises, and for the purpose of the making of

said order, we, the undersigned, H. B. Thornberry, as principal, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer and W. N. Morse, residents and freeholders in said County and State, as sureties, undertake, on behalf of defendant, and are bound to the plaintiff in the sum of $15,000.00, and promise the plaintiff that, in case the plaintiff recover judgment in said action, the defendant will, or in default thereof, we, his sureties, will, on demand, pay to the plaintiff the amount of the judgment that he may recover against the defendant in said action, not exceeding the amount of $15,000.00 and the costs and disbursements of said action."

Upon the giving and filing of said bond or undertaking the attachment upon the real property of the defendant, H. B. Thornberry was released and discharged.

On January 12, 1922, plaintiff recovered judgment against said Thornberry in said action for the sum of $13,902.50. Thereafter, plaintiff demanded payment of said judgment from the defendants in error, sureties on said bond or undertaking, but payment was refused by them.

Plaintiff prayed for judgment against said sureties in the said sum of $13,902.50, together with interest and costs.

The defendants in error filed a demurrer to plaintiff's complaint, specifying the following grounds of demurrer, to wit:

(a) That the court has no jurisdiction of the person of the defendants, or the subject of action.

(b) That the plaintiff has not legal capacity to sue.

(c) That the complaint does not state facts sufficient to constitute a cause of action.

On the 10th day of April, 1922, the judge of said District Court sustained defendants' demurrer to plaintiff's complaint, upon the ground that the bond, having been sufficient for the state Court to order the release of the property of Thornberry from the lien of the attachment, that, therefore, it was an undertaking upon which judgment, under Section 308, Oregon Laws, could have been given against the sureties, at the time of the giving of judgment against Thornberry, in the action, and that plaintiff having failed to take judgment against said sureties at the time of the entry of judgment against Thornberry, it lost its right to demand, in any Court, judgment against the said sureties upon said bond or undertaking, and a judgment dismissing this action was entered.

(Transcription of the oral opinions of the District Judge are printed in an appendix hereto.)

The order sustaining defendants' demurrer to plaintiff's complaint, and the judgment dismissing this said action, plaintiff contends to be grievous error, and that the demurrer to plaintiff's complaint should have been overruled.

ERRORS ASSIGNED.

The plaintiff's formal assignments of errors may be condensed into two propositions:

(1) That the District Court erred in holding the bond in question to be such a compliance with the provisions of Section 311, Oregon Laws, as to have justified the Court wherein the same was filed, to have entered judgment against the sureties at the time of entering judgment against Thornberry under the provisions of Section 308, Oregon Laws, and that plaintiff's only remedy was by judgment against the sureties under Section 308, Oregon Laws.

(2) That the District Court erred in holding that if the bond in question was in compliance with said Section 311, the plaintiff did not have the right to pursue its remedy, either under Section 308, Oregon Laws, or by action on the bond, as a common law obligation.

POINTS AND AUTHORITIES SUPPORTING THE FIRST PROPOSITION.

Oregon Laws, pertaining to the discharge of an attachment and to the entry of judgment against sureties upon undertaking to discharge attachments, are as follows:

> "Section 310. MOTION TO DISCHARGE ATTACHMENT. Whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court or judge where the

action is pending, or to the clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in the next section; and if the application be allowed, all the proceeds of sales, and property remaining in his hands, shall be released from the attachment and delivered to the defendant, upon his serving a certified copy of the order on the sheriff.

Section 311. Undertaking Upon Application to Discharge Attachment. Upon such application, the defendant shall deliver to the court, or judge to whom the application is made an undertaking, executed by one or more sureties, resident householders or freeholders of this state, to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. If the plaintiff demand it, the sureties shall be required to justify in the same manner as bail upon an arrest.

Section 308. Order Shall Direct Sale of Attached Property, When. If judgment is recovered by the plaintiff, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if there be any such property or proceeds remaining after satisfying such execution, he shall, upon demand, deliver the same to the defendant; or if the property attached shall have been released from attachment by reason of the giving of the undertaking by the defendant, as provided by section 311, *the court shall upon giving judgment against the defendant or*

> *defendants also give judgment in like manner and with like effect against the surety or sureties in such undertaking."*

The undertaking in this action was accepted by the Court and upon the filing thereof the attachment was discharged. It by no means follows from this that it was such an undertaking upon which judgment could have been entered against the sureties at the time judgment was entered against Thornberry.

The form required for the undertaking provided for in Section 311, is

> "to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action."

The sureties, in the undertaking herein, in consideration of the release and discharge of the lien of the attachment,

> "promise the plaintiff that in case plaintiff recover judgment in said action, the defendant will, or in default thereof we, his sureties will, ON DEMAND, pay to plaintiff the amount of the judgment he may recover against the defendant in said action, not exceeding the amount of $15,000.00."

The sureties by their undertaking in this action contracted to pay the judgment entered against Thornberry upon two conditions: (1) upon his default in the payment thereof, and, (2) after demand had been made upon them for the payment of the judgment entered against Thornberry.

"Sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption. This rule is followed both at law and in equity. Construction in favor of the surety should not, however, be carried to the length of giving the contract a forced and unreasonable construction with the view of relieving him."

32 Cyc. 73.

"As against sureties no implications are to be made in giving construction to the terms of a bond not clearly embraced within the language used, for it is well settled that sureties are only chargeable according to the strict terms of the bond."

9 C. J. 32.

"Sureties are favorites of the law, and are not bound beyond the strict terms of the engagement; that their liability is not to be extended by implication beyond the terms of their contract, which contract is said to be *strictissima juris.*"

Graeter v. De Wolf (Ind.), 13 N. E. 111.

The editor of the L. R. A. (N. S.), in note under the case of First National Bank of Waterloo v. Story, 200 N. Y. 346, 93 N. E. 940, 34 L. R. A. (N. S.) 154, says:

"Few cases have been found where the question has been directly decided whether a demand is a condition precedent to an action upon a promise to pay on demand the debt of another and these have been followed in First National Bank v. Storey in holding a demand necessary."

In First National Bank v. Story, action was brought against the makers of a written instrument as follows:

> "We, the undersigned, do hereby jointly and severally for ourselves and our and each of our heirs, executors, and administrators, guarantee and warrant unto the said bank, its successors and assigns, the prompt payment at maturity of each and all the notes, checks, drafts, bills of exchange and other obligations in writing of every name and kind made, signed, drawn, accepted, or indorsed by the said Waterloo Organ Company, which the said bank now has, or which it may hereafter have, hold, purchase, or obtain within one year from date hereof; but our liabilities hereunder shall not at any time exceed the sum of $15,000.00 and interest thereon. And in case default is made in the payment at maturity of any of the above-mentioned obligations, or in the payment of any lawful claim or demand held by said bank against said company, we do hereby jointly and severally covenant, promise and agree to pay the same to the said bank, its successors, or assigns *upon demand.*"

No demand of payment was alleged or proved. After an extended and careful review of cases, Mr. Justice Vann, who delivered the opinion of the Court, said:

> "I think that when a promise is to pay one's own debt, on demand, none is required, because the law implies a promise to pay, and the express promise forms no part of the consideration and adds nothing to the obligation. When, however, the promise is not to pay one's own debt, but the debt of another yet to come into existence, on demand, there is no precedent duty, and the obligation to pay rests wholly

on the promise in the form made and the promise is binding only in the form made. As, according to the promise, nothing was payable except on demand, there could be no breach until demand made. 'When there is a duty which the law makes payable on demand, there need be none alleged, but otherwise where there is no duty until a demand.' To the contention that the obligor is not harmed in the one case more than in the other, because he can avoid liability for costs in the one the same as in the other, the obvious answer is that *he was not bound to pay at all except by his collateral promise, and he had the right to limit that promise by annexing any condition that he saw fit.*

I think upon principle as well as authority the following propositions should be announced as the law:

(1) When the promise is *to pay one's own debt* for a specified amount on demand, *no demand need be alleged or proved.*

(2) When the promise to pay on demand is not to pay one's own debt, *but is a collateral promise to pay the debt of another, a demand is necessary,* for it is part of the cause of action."

The Supreme Court of California holds to like effect in Pierce v. Whiting, 63 Cal. 538. It is there said:

"The case of Sicklemore v. Thistleton, 6 Maule & S. 9, illustrates the rule as to promise for payment of money to a third person. In that case the plaintiff declared upon a lease in which the defendant had, as surety for the tenant, covenanted 'that the tenant should at all times during his term, well and truly pay or cause to be paid to the plaintiff the rents as they became due, according to the terms of the lease, and that in case the tenant should neglect to pay

the rent for forty days, defendant shall pay on demand.' Speaking of the covenant of the surety Lord Ellenborough said: 'I own that I cannot help thinking this is a qualified covenant, and that the stipulation, that if the lessee shall neglect to pay for forty days, the surety shall pay on demand * * * does, in reasonable construction, pervade and restrain the former covenant. According to the authority of Browning v. Wright, 2 Bos. & P. 13, covenants ought to be construed with due regard to the intention of the parties, as it is to be collected from the whole context of the instrument, so as to make one entire and consistent construction of the whole. And it appears to me that that would not be a consistent or just construction of this instrument, which would have the effect of making the defendant, who is only a surety liable in the first instance, without notice, immediately upon the rent becoming due.' And Bailey, J., said: 'It is not possible that the latter clause, as it regards the surety, is a qualification of the former. Covenants must necessarily be construed all together in order to attain their true meaning. The meaning of these covenants is, that the defendant does not become chargeable *eo instanti* the rent becomes due, but only after forty days non-payment and *after demand made.*

If there is any principle of law well settled, it is that the liability of sureties is not to be extended beyond the terms of their contract. To the extent and in the manner and under the circumstances pointed out in their obligation they are bound, and no further; they are entitled to stand on its precise terms."

Section 308 of the Oregon Laws authorizes the judgment to be entered against the sureties when the bond is given *as provided in Section 311.* The

latter section contemplates a bond wherein the sureties promise to pay the judgment entered against the defendant. That is they must promise to pay that judgment *eo instanti* upon its entry. This promise and this alone can authorize the entry of the judgment under the powers given the Court by said Section 308 against the sureties. That this bond is not such a contract upon their part is apparent. The *demand* upon the surety was required to call into existence the obligation of the sureties to pay the judgment. Had the Court entered judgment against them at the time it entered judgment against Thornberry it would have entered a judgment against them which was baseless, no obligation whatsoever upon the part of the sureties could have arisen until there was a judgment against Thornberry, until he had defaulted, and until the demand had been made upon the sureties for the payment.

Section 308, Oregon Laws, provides for a drastic and summary remedy against the surety. Under its terms a judgment may be entered against him upon the entry of judgment against the defendant, even though the plaintiff may have committed some act between the time of the filing of the bond and the entry of the judgment, and not appearing of record, that would effectually destroy the obligation of the surety. Such judgment may be entered without notice to the surety. (McCargar v. Moore, 88 Or. 682, 157 Pac. 1107.) In this event, the property of the surety is charged with the lien of the judgment

until he may come into court, and, by appropriate motion or petition procure an order canceling and annulling the judgment.

> "Statutes authorizing summary remedies on forthcoming, delivery or dissolution bonds are to be strictly construed, and are available only where the bond is such as the statute contemplates."
>
> 6 C. J., par. 740, page 350.

In McCargar v. Moore, *supra,* the Supreme Court of Oregon recognizes the principle that the summary remedy provided by Section 308, does not impair the effect of any legal defense on the part of the surety.

The authorities heretofore cited clearly establish the rule that upon undertakings such as this, where a *demand* upon *the surety* is provided for by the terms of the instrument, that such demand *must* be made before his obligation on the bond accrues. In the absence of a statute such as said Section 308, a demand would have to be alleged and proved before an action on this bond would lie. The failure of the plaintiff to make the demand could be pleaded and proved by the sureties as a complete defense to an action on this bond. Judgment, therefore, could not have been entered by the State Court against these sureties at the time of the entry of the judgment against Thornberry, for, obviously, in so doing the State Court would have deprived them of a right specifically reserved to them by the terms of their contract, to-wit: the right to have a demand made upon them to pay the

judgment against Thornberry, before any obligation of theirs became due to the plaintiff or even came into existence. It would have deprived them of a right of such dignity as to have constituted a complete defense to the right of the plaintiff to have maintained an action on the bond in the absence of the statute in question.

The conclusion of the District Court that this bond is a statutory bond is based upon the decision of Ebner v. Heid, 125 Fed. 680. The bond there provides:

> "We, the undersigned, * * * in consideration of the premises and in consideration of the release from attachment of all the property attached as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake and promise that in case said plaintiffs recover judgment in said action, the defendant will, on demand, pay to the said plaintiffs the amount of said judgment, together with the costs and disbursements of this action."

Let us point out, that the decision in Ebner v. Heid was rendered long prior to the enactment of the provision in said Section 308 for the summary entry of judgment against the surety. Ebner v. Heid was decided September 14, 1903, and the provision for the summary remedy against sureties on dissolution bonds was enacted in 1907. At the time of the decision in Ebner v. Heid a plaintiff's only means of enforcing the obligation of the bond was by action at law. If the bond was not in accord with Section 311, it was good as a common law

obligation. The language of the Court in that decision to the effect that the bond there involved was a substantial compliance with the statute was unnecessary to the conclusion reached, and is *obiter dictum*. It was immaterial, there, whether or not the bond was in compliance with the statute. In either event, the attachment having been discharged, the sureties were liable to the plaintiff on the bond as a common law obligation, and the Court so held.

Again, the bond in Ebner v. Heid differs from the bond here in a very material particular. The former provides that *defendant* will, *on demand,* pay to the plaintiff the amount of the judgment, the latter that the *sureties will, on demand,* pay the amount of the judgment. The decisions heretofore cited clearly point out that where the bond provides that the principal will pay, on demand, a formal demand upon him is not necessary to fix the obligation, nor is such demand a prerequisite to the maintenance of an action, while in the case of a demand upon the sureties being provided for by the bond, such demand upon them is a necessary prerequisite to the fixing of the obligation of the sureties, a condition precedent to an action on the bond. Had the bond here involved only provided that Thornberry would pay, *on demand,* the bond might have been properly held to justify the summary entry of judgment against the sureties, but it does not so provide, and it does provide specifically for *a demand on the sureties.*

The defendants in error, by their contract, reserved to themselves a right, substantial and manifestly to their advantage, and one so recognized by competent authority. They clearly and expressly stated in the instrument their intent to reserve to themselves the right to have demand made upon them for, to have opportunity to make, payment of this judgment against Thornberry before any enforcible right should accrue to plaintiff. The State Court did not have power to deny them this right expressly reserved to them by the bond, by summarily entering judgment against them.

The decisions of our Courts must be viewed in the light of circumstances existing at the time of their rendition. The condition as exists in this case did not exist when Ebner v. Heid was decided. That decision is by no means an authority supporting the position of the District Court, that the bond in that case having been held sufficient to warrant the discharge of the attachment and subject the sureties to liability *in an action,* that the bond here, containing a vitally different condition is a sufficient compliance with Section 311 to have warranted the summary entry of judgment against the sureties here under the provisions of Section 308.

The principle of the decisions heretofore cited that a demand on the defendant is not a prerequisite to fixing the obligation of the sureties is recognized by Judge Morrow in the decision of Ebner v. Heid, wherein he says:

> "It is true, the agreement was that the defendant would on demand pay the judgment,

> if one was recovered in the action, but that is the equivalent to an agreement to pay the judgment if one was recovered against the defendant."

Very clearly, the promise of *the surety* to pay, *on demand,* is not equivalent to *a promise on his part to pay the judgment.*

The District Judge reasons, that since the bond was given for the purpose of obtaining a discharge of the attachment that it is in effect a statutory bond. It is true that it was given to release the attachment and that it was accepted by the State Court and the attachment was released. Section 311 provides that the bond shall be to the effect that the sureties will pay the judgment. It is plain that the bond may vary materially from this particular language and yet be sufficient to warrant the discharge of the attachment if it be accepted by the Court, particularly in the absence of objection by the plaintiff. Assume that a defendant made his motion in accordance with the provisions of Section 310 and offered a bond providing that in event plaintiff recovered judgment that the surety or sureties would pay the same thirty days, six months or one year after entry of the judgment against the defendant. Section 311 provides for a bond to the effect that they will pay the judgment. Clearly, this means that the sureties shall promise to pay the judgment immediately and without any condition precedent. Section 308 gives the Court power to summarily enter judgment against the

sureties only when the bond is as provided by Section 311. That is, when there is no condition precedent and the bond is an unqualified promise to pay the judgment entered against the defendant *eo instanti.* In the event of the promise of the sureties being conditional, as to the effect that they will pay the judgment thirty days, six months or one year after entry of judgment against the defendant, or after entry of judgment against the defendant and *upon demand* made upon them for the payment of that judgment, the Court may, in the absence of objection of plaintiff, accept the bond and order the attachment released and discharged. In such event the bond serves the purpose of discharging the attachment, but does not warrant the summary entry of judgment against the sureties. And we therefore submit, that the bond in this case was and is utterly and entirely insufficient to have warranted the State Court to have entered judgment against these sureties at the time it entered judgment against the defendant, Thornberry.

The complaint states a cause of action against the defendants upon their obligation and promise to plaintiff, for a valuable consideration, to pay the amount of the judgment, on demand, entered in favor of plaintiff and against Thornberry, upon the common law bond or undertaking set forth in the complaint, and the Court erred in sustaining defendants' demurrer thereto and in ordering the action dismissed.

It is true the undertaking states that it was given in compliance with Sections 310 and 311, Lord's Oregon Laws, yet we have heretofore pointed out that while it was sufficient in form for the Court's order dissolving the attachment, it was not such a compliance with the requirements of Section 311 as to give the State Court power or right to summarily enter judgment against the defendants at the same time judgment was entered against Thornberry, because the contract of the defendants with the plaintiff was, that in case Thornberry defaulted in the payment of the judgment, the defendants herein would *on demand* pay to the plaintiff the amount of the judgment. It was not defendants' intention, as expressed in the undertaking, that judgment should be so entered against them. No objection was made by plaintiff to the discharge of the attachment, in consideration of the undertaking as given by defendants. The attachment was discharged, and the consideration plaintiff received for the release of its attachment lien upon Thornberry's property was this undertaking, signed, sealed and delivered by the defendants, and constituting a common law bond. If it was intended that this bond should be a compliance with Section 311 and it was in fact not in compliance therewith, it is still valid as a common-law undertaking.

> "'Common Law Bonds' and 'Statutory Bonds' are to be distinguished in that the latter conform to a statute while the former do not, *although it so was intended.*"
>
> 9 C. J. 32;
>
> Mt. Vernon v. Brett, N. Y., 86 N. E. 6, 10.

In the case of Palmer v. Vance, 13 Cal. 553, the Court, at page 557, says:

> "The paper sued on is not a statutory undertaking, but being founded upon a sufficient consideration, is valid as a common law obligation for the payment of money. A bond taken by the sheriff is not void for want of conformity to the requirements of the statute, which, while prescribing one form of action, does not prohibit others; and a bond given voluntarily upon the delivery of property is valid at common law." (Whitsett v. Womack, 8 Ala. 466.)

In the case of Smith v. Fargo, 57 Cal. 157, 159, in passing upon the undertaking given to release property from attachment, under the laws of California, the Court said:

> "It was not a statutory undertaking, and cannot be held valid and binding as such. It was a common law bond, and if binding upon the sureties, it must be so under the principles of the common law. This question was before the court in the case of Palmer v. Vance, 13 Cal. 553, and it was there said (quoting the paragraph above set forth). In the case of Whitsett v. Womack, 8 Ala. 466, the Court says: 'Where a statute requires a bond to be executed in a particular form, and not otherwise, no recovery can be had on a bond professedly taken under the authority of the act, if it does not conform to it, but if the statute merely prescribes the form, without making a prohibition of any other, a bond which varies from it may be good at common law.' (See also, Seawell v. Cohn, 2 Nev. 311.)
>
> The bond declared upon was given voluntarily upon a sufficient consideration, and was good at common law, according to the above authorities."

It will be noted that Section 311 does not provide that the undertaking there provided for must be in the form as there set forth *and in no other form.*

The case of Gardiner v. Donnelly, 86 Cal. 367, 372, was an action upon an undertaking to procure the release of an attachment. It was given after the service of notice of motion under the provisions of Sections 554 and 555 of the California Code of Civil Procedure, the Court accepted and approved the bond, it was filed in the case and an order made releasing the attachment, precisely as was done in the case at bar. It did not conform to the statute. The Court said:

> "It was given for a purpose, which was accomplished when the order was obtained, and it then became binding on its makers as a common law obligation, and cannot now be repudiated by those who asked for and received its benefits."

In the case of Bunneman v. Wagner, 16 Or. 433, the Court held:

> "The principle is familiar that bonds intended to be taken in compliance with statutes, although not done so, if entered into voluntarily and founded upon a valid consideration, and do not violate public policy, or contravene any statute, will be enforced by common-law remedies."

The principle above announced in Bunneman v. Wagner, is cited with approval in the case of Port-

land v. Portland etc. Co., 33 Or. 317, the Court saying:

> "The rule is perhaps more tersely stated by the Supreme Court of the United States, that, if a contract is entered into by competent parties, and for a lawful purpose, not prohibited by law, and is founded upon a sufficient consideration, it is a valid contract at common law. U. S. v. Tingley, 5 Pet. 115; U. S. v. Linn, 15 Pet. 290."

The case of Ebner v. Heid, 125 Fed. 680, was brought to recover on an undertaking given for the discharge of property from attachment. The undertaking was given in Alaska, under the provisions of 311 of the Oregon Laws and was conditioned and the sureties therein undertook and promised, "that in case said plaintiffs recovered judgment in said action, the *defendant* will, *on demand,* pay to the said plaintiff the amount of said judgment." Justice Morrow, who rendered the opinion of the Court, there said:

> "The undertaking appears also to be valid as a common-law obligation. As set forth in the record now before the Court, it is under seal, and recites as a consideration the release from attachment of all the property attached, and the discharge of the attachment. This was a sufficient consideration for the undertaking."

POINTS AND AUTHORITIES SUPPORTING THE SECOND PROPOSITION.

The conclusion of the District Court that, since the Supreme Court of Oregon has adopted the rule

that the failure to order the attached property sold at the time judgment against the defendant is entered discharges the lien of the attachment, it likewise must follow that the failure of the Court to enter judgment against the sureties at the time of entering judgment against the defendant discharges the sureties on the bond, is erroneous.

These decisions, following the provision of Section 308, viz:

> "If judgment is recovered by the plaintiff * * * and * * * property has been attached in the action * * * the court shall order * * * the property to be sold"

are in accordance with the well established rule that where a right or remedy rests wholly and entirely upon a statute, the statute will be strictly construed in directing the manner in which the right must be retained or the remedy enforced. Attachment proceedings are statutory. These statutes must be strictly followed. (Murphy v. Bjelik, 87 Or. 329.) The lien of an attachment is purely a creature of statutory birth; it was unknown to the common law. We think the Supreme Court of Oregon very properly held that the provision of Section 308 should be strictly followed if the lien of the attachment is to be preserved to the plaintiff. Vastly different, however, is the status of the liability of the sureties. While the attachment was in force the plaintiff had, to protect the judgment which it sought to recover, the lien upon the property; this lien was of purely statutory creation. When the attachment was discharged by the giving of the bond the plain-

tiff had, to protect the judgment, the promise of the sureties to pay the same. The latter liability is *not founded upon statute* but *upon the contract of the sureties.* The statute creates the lien of the attachment and fastens it upon the property attached. The bond, the *solemn written contract* of the sureties, their *promise,* that in consideration of the release of the attachment, they will pay any judgment the plaintiff recovers in the action is the foundation of their liability to the plaintiff. The rule that a remedy provided by statute must be strictly followed has no application to the liability of the sureties. It is true that the bond is a substitute for the attachment, but it is equally true that the attachment lien, the creature of the statute, is destroyed upon the giving of the bond, and that in its place and stead there is no longer a right resting upon statute, but a right accruing to plaintiff and an obligation fastened upon the sureties by *their own express contract.* The statutory lien has been replaced by a contractual obligation. The reasoning upon which the Supreme Court of Oregon bases its conclusion that the failure to order the attached property sold destroys the lien, viz: that the lien has been created solely by statute and that the statutory remedy must be strictly followed to preserve the *statutory lien,* by no means applies to the remedy provided to enforce the *contractual obligation* of the sureties. It, therefore, does not follow that the failure to enter judgment against the sureties is a waiver of recourse against them. The right to follow the lien of the attachment rests wholly upon the remedy pro-

vided by the statute, while the right to enforce the contractual obligation of the surety rests upon a broader and firmer foundation. This right, is founded, not upon statute but upon contract, and may be enforced by any appropriate remedy either given by statute or given by the ancient and honored principles and practices of the common law.

The soundness of the proposition that, since the bond is a substitute for the attachment, anything that destroys the lien of the attachment destroys the liability of the sureties, is denied by the Supreme Court of Oregon in Bunneman v. Wagner, *supra,* wherein it is said:

> "There are several assignments of error and among the first to be noted is whether the death of the defendant Dipascuale dissolved the attachment, and exonerated the defendant Wagner of his liability as surety upon the undertaking. This objection is founded upon the assumption that, when an undertaking is given it takes the place of the property released, but does not discharge the attachment; and that, when the defendant Dipascuale died thereafter, its effect was to dissolve such attachment, and consequently to relieve the defendant Wagner of his liability as surety on such undertaking. But the law is otherwise. When the undertaking was given, and the property was released, the bond did stand as security for the property, or took its place; but its effect was to dissolve the attachment. 'By giving the statutory bond', Mr. Wade says, 'the attachment is dissolved, and the action proceeds to judgment as an action *in personam.*' And, again: 'When a bond is given to pay whatever judgment may be rendered, and is approved and the property released, the attachment is dissolved, and it is

> no longer a proceeding *in rem,* and no plea in abatement traversing the ground of the attachment can be entertained.' 1 Wade, Attachm., pars. 183, 186. When, therefore, the undertaking was given, and by reason thereof the plaintiff released and surrendered the property to the defendant Dipascuale, the attachment was dissolved, and the undertaking took the place of such property, the action thereafter ceased to be *in rem.* There was, in fact, no attachment in existence to be dissolved at the death of the defendant, Dipascuale. Nor is it true, if there was a subsisting attachment, that the death of the defendant abates or dissolves it."

Since the amendment of 1907 to Section 308, Oregon Laws, there has been no decision in Oregon on the question as to whether or not the remedy given the plaintiff against the sureties in the original action is exclusive. The question has been, however, before the Courts of several states having statutes providing for summary entry of judgment against sureties on dissolution bonds, and nowhere has the narrow construction given Section 308 by the District Court herein been given to such statutes elsewhere.

The Iowa code provides:

> "Sec. 2994. If the defendant, at any time before judgment, causes a bond to be executed to the plaintiff with sufficient sureties to be approved by the officer having the attachment, or after return thereof by the clerk, to the effect that he will perform the judgment of the court, the attachment shall be discharged and restitution made of property taken or proceeds thereof. The execution of such bond shall be

deemed an appearance of such defendant to the action.

Section 2995. Such bond shall be part of the record, and, if judgment go against the defendant, *the same shall be entered against him and sureties.*"

In State v. McGlothlin, 61 Iowa 312, 16 N. W. 137, a complaint was filed under the bastardy statute and property of one Jacob McGlothlin attached. He and the defendant, as surety, executed a bond in accordance with said Section 2994 and the attachment was released. Later judgment was entered against the defendant alone and an action was brought on the bond. The Court, in deciding this case had before it the precise question as to whether or not the statutory remedy was the exclusive means of enforcing payment of the judgment by the surety and held that it *was not* upon the same reasoning as we have herein pointed out, viz: that the obligation of the surety is not a statutory obligation.

The Court said:

"Because no such judgment was rendered against the defendant in the bastardy proceeding it is insisted none can be now, the argument being that the remedy on the bond is statutory and exclusive. In support of this proposition, Cole v. City of Muscatine, 14 Iowa 296, is cited. In that case it was held the plaintiff had no remedy at common law, and therefore he must pursue the remedy provided by statute. This is obvious. In the case at bar, we think, the plaintiff could have maintained an action on the bond at common law if none had been provided by statute. The latter, therefore, is merely an additional remedy. The bond it is true is statu-

tory, but the release of the lien of the attachment constituted a sufficient consideration, and no reason can be given why an action at common law cannot be maintained thereon, unless the statute is both mandatory and exclusive which is claimed. If this contention is adopted then the same judgment which is entered against the principal must be entered against the surety, although the latter might not be liable to the same extent as the principal; at least, a strict construction would require such a judgment. But, in our opinion, whether this is true or not, *the plaintiff is not confined to the statutory remedy.*"

To like effect are the following decisions:

"The present plaintiff might have had the bond returned forfeited, and an execution issued upon it as a judgment; but these rights were not exclusive of his right to sue, as he has in this case, on the bond itself."

Troy v. Rodgers (Alabama), 22 So. 486.

"The statute intends to give the party choice of two remedies; one by motion in aid of the original suit. The other by an independent action on the bond."

McDowell v. Morgan, 33 Mo. 555, 557.

"It is argued that the action is unauthorized and improper because of the act of Mar. 10, 1875 (Mansfield Digest, sec. 355), it was competent to have had the value of the property assessed and a judgment rendered against the sureties in the original action. And that the plaintiff having neglected to so proceed has lost all remedy upon the bond. But the summary remedy against the sureties, provided for by this statute, is evidently cumulative. It simply enacts that

> the assessment shall be made and judgment rendered against the sureties for the assessed value, upon demand of the plaintiff. If this is not done the plaintiff may still resort to his action upon the bond."
>
> Chapline v. Robertson, 44 Ark. 202.

The principle is stated in Corpus Juris as follows:

> "An action on a bond for the forthcoming of property or discharge of an attachment is not excluded by other and summary remedies provided for the enforcement of such liabilities."
>
> 6 C. J., par. 741, page 351.

Rules of practice are designed to provide an orderly method for the conduct of judicial procedure, but the astute attorney dearly loves to induce the Courts to hold so strictly and closely to an exact wording of a statute or a finely drawn analogy that an action designed to enforce an obligation of a defendant unwilling to fairly meet its terms may be dismissed before the issues thereof may be heard upon their merits. This case is a glaring example of a cause having been dismissed absolutely and entirely for no reason other than upon a highly technical question of whether or not a remedy other than the one chosen by the plaintiff was a proper one. The orderly course of judicial procedure in the State of Oregon does not require the narrow construction placed upon Section 308, Oregon Laws, by the District Court herein. This section was designed to facilitate the enforcement of bonds of this character and not to provide a means whereby sureties thereon

may escape liability in every instance where for one reason or another the Court may not enter judgment against the surety at the time of the entry of judgment against the defendant. Such construction, which will leave the plaintiff in the action and the sureties on the bond to have their differences adjusted upon their merits in an action brought upon the bond, in event any question between them is raised in an attachment suit, as to whether or not the bond is sufficient to warrant the summary entry of judgment, is one far better suited to have equity done between them, than is the construction given by the District Court to said Section 308 in this action. This construction must result in encouragement to sureties and their attorneys to seek, by quiddity and cavil, quillet and trick, to escape the performance of the promise of the sureties.

> "It is to be borne in mind that in cases of this character, technical defenses are not favored." (Bunneman v. Wagner, 16 Or. 433.)

We submit, that in a situation such as this, regardless of whether the undertaking be in accord with the exact provision of the statute, or otherwise, the broad construction which permits the plaintiff to pursue either the statutory remedy, or the common law remedy of an action at law, upon the bond, is the better and the sounder reasoning.

If the plaintiff may pursue its remedy against these defendants in an action at law, the jurisdiction of the action is vested in the District Court of the United States for the District of Oregon. It is al-

leged in the complaint that the defendants are each citizens and residents of the State and District of Oregon, and that the plaintiff is a National Banking Association, having its only place of business in California, and that it is a citizen and resident of the State of California.

That a National Bank is a resident and citizen of the State in which it conducts its business is established by the Supreme Court of the United States in Petri v. Commercial Bank, 142 U. S. 644, and Continental Bank v. Buford, 191 U. S. 119.

Wherefore, we respectfully submit that the judgment of the District Court herein should be reversed, and said Court directed to overrule defendants' demurrer to plaintiff's complaint.

Dated, San Francisco,
September 1, 1922.

FRANK W. STREET,
HORACE M. STREET,
Attorneys for Plaintiff in Error.

(APPENDIX FOLLOWS.)

Appendix.

Appendix

[Title of Court and Cause.]

OPINION.

Portland, Oregon, April 3, 1922.
10:00 A. M.

Bean, D. J.:

The case of the First National Bank of Antioch against McKean and others is an action on a bond given by the defendants for the discharge of an attachment. It seems that in November, 1919, the plaintiff in this action began proceedings in the State Court against one Thornberry for the sum of $12,000.00, and thereafter a writ of attachment was issued and Thornberry's property seized under that writ. Subsequently the defendant to this action gave a bond for the release of the attachment and it was released. Thereafter the plaintiff recovered a judgment against Thornberry, but failed and neglected to take any order or judgment against the bondsmen and subsequently brought an action in this Court upon the bond.

Now, the Oregon statute provides that an attachment may be dissolved upon the giving of a bond or undertaking to the effect that the sureties will pay the judgment recovered against the defendant, and Section 308 of the statute directs that where

property has been attached the Court in entering judgment shall order and direct a sale of the attached property, or, if the property attached shall have been released from attachment by reason of the giving of the undertaking provided in Section 311, the Court shall, upon giving judgment against the defendant or defendants, also give judgment in like manner and with like effect against the surety or sureties in such undertaking.

Now, then, under the statute the surety bond given for the release of the attachment stood in place of the attachment, and the statute provides in giving judgment for the plaintiff the Court shall also give judgment for the sureties, so that I take it it stands in exactly the same position as if the attachment had not been released or had remained in legal force and effect at the date of the judgment. The Courts of Oregon have held repeatedly, and I take it to be established rule, that any order determining the amount of the judgment and not ordering the sale of the attached property itself, any claim or lien is lost. This has been repeatedly held and reaffirmed in the 40th Oregon, 114, so that, inasmuch as the bond stood in place of the attachment and the statute (requiring?) a like judgment to be entered against the surety, it seems to me, under the Oregon decisions, that there is no alternative except for the Court to hold that this action cannot be maintained.

Therefore the demurrer will be sustained.

[Title of Court and Cause.]

OPINION.

Portland, Oregon, April 10, 1922.
10:00 A. M.

Bean, D. J.:

The case of First National Bank of Antioch against McKean was disposed of, or at least a demurrer to the complaint was passed upon last Monday. The Court, however, through inexcusable inadvertence, overlooked the fact that the plaintiff had been granted permission to file a brief. That brief has now been filed and I have examined it. The only point made in the brief that was not disposed of on Monday last is that the bond or undertaking given by the defendants was not a statutory bond because it provides that in case the plaintiff recover judgment the defendant will pay the same, or, in default thereof, the sureties will on demand do so, and it is claimed that this is not a statutory bond but a common law bond and therefore the plaintiff was not required under the statute to take the judgment against the sureties at the same time that plaintiff took judgment against the defendants. But the bond was given for the purpose of obtaining a discharge of an attachment. It is in effect a statutory bond, and such was the holding of the Court of Appeals in this District in the case of Ebner v. Heid, 125 Fed. 680, in which case the Court had occasion to construe and consider a bond in language almost exactly the same as the one now in question, and therefore I take it that the demurrer be well taken, notwithstanding the point made by the plaintiff in its brief.

No. 3911

In The

United States
Circuit Court of Appeals
For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH
(A Corporation),

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

Brief of Defendants in Error Upon Writ of Error to the District Court of the United States for the District of Oregon.

JOSEPH, HANEY and LITTLEFIELD,
PLOWDEN STOTT,
Attorneys for Defendants in Error.

Marsh Printing Company

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Brief of Defendants in Error Upon Writ of Error to the District Court of the United States for the District of Oregon.

STATEMENT.

Without desiring to criticise counsel's statement of facts, we think an amplification of it will be helpful to the court.

On November 25, 1919, in the Circuit Court of the State of Oregon, for Sherman County, First National Bank of Antioch, plaintiff in error herein, instituted an action at law against H. B. Thornberry to recover from said H. B. Thornberry the sum of $12,906.08, with interest and costs, and for the further sum of $1,660.00 as attorney's fees, upon a contract for the direct payment of money. On said 25th day of November, 1919, a writ of attachment was issued out of said court, in said action, and on said day the Sheriff of Sherman County, Oregon, levied upon all of the real property of said H. B. Thornberry in said Sherman County, Oregon, that is, upon about 2,000 acres of farm lands.

On the 17th day of January, 1920, said H. B. Thornberry, having appeared in said action, applied to the court for a release and discharge of the attachment and delivered to the judge of said court, and filed in said action, a bond or undertaking, duly executed by the defendant in said action, H. B. Thornberry, and all of the parties who are defendants in error in the present action now before the court, *and which said bond specifically provided that it was drawn and given in compliance with Sections* 310 *and* 311 *Oregon Laws,* and for the purpose of securing a release of the attachment against the real property of H. B. Thornberry, and provided, amongst other things, that said sureties on behalf of defendant, H. B. Thornberry, are bound to the plaintiff in the sum of $15,000 and the costs and

disbursements of the action. Upon the giving and filing of said bond or undertaking in said action, the attachment upon the real property of defendant, H. B. Thornberry, was released and discharged.

On January 12th, 1922, plaintiff in error, who was plaintiff in the Sherman County, Oregon, case, recovered a judgment against said H. B. Thornberry in said action for the sum of $13,902.50. On January 12, 1922, plaintiff in error failed and neglected to take judgment against the sureties on said undertaking, as provided by Section 308, Oregon Laws.

Thereafter, plaintiff in error made demand upon the sureties for the payment of said judgment, but demand was refused. Thereupon, plaintiff in error brought this action and has sued all the sureties jointly and collectively, and has attached their and each of their real property in the State of Oregon.

Defendants in error filed a demurrer to plaintiff's complaint, specifying the following grounds of demurrer, to-wit:

(a) That the Court has no jurisdiction of the person of the defendants, or the subject of the action.

(b) That the plaintiff has not legal capacity to sue.

(c) That he complaint does not state facts sufficient to constitute a cause of action.

The District Court in oral opinions (transcripts of which are printed in an appendix to the brief of counsel for plaintiff in error) sustained defendants' demurrer on the ground and for the reasons:

(1) That the bond in this case is a statutory bond and such was the holding of the Court of Appeals in this District, in the case of EBNER v. HEID, 125 Fed. 680, in which case the court had occasion to construe and consider a bond in language almost exactly the same as the one now in question;

(2) That the undertaking provided in Section 311, Oregon Laws, stood in place of the attachment and that under the Oregon law, failure to take an order of sale of the attached property at the time judgment was entered, waived the lien of attachment;

(3) That the Oregon Courts have held repeatedly and that it is the established rule that any order determining the amount of the judgment and not ordering the sale of the attached property, itself is a waiver of the attachment lien;

(4) Inasmuch as under the Oregon decisions the bond stood in place of the attachment requiring a like judgment to be entered against the surety, a failure to so enter the judgment against the surety releases the surety.

POINTS AND AUTHORITIES.

I.

The bond in this case is in effect a statutory bond provided for in Section 311 Oregon Laws.

Section 311 Oregon Laws;
Ebner v. Heid, 125 Fed. 680.

II.

Section 308 Oregon Laws, providing that the court shall, upon giving judgment against the defendant, shall also give judgment in like manner and with like effect against the sureties in the undertaking, is mandatory and peremptory.

Ah Lep v. Gong Choy, 13 Or. 431;
McCargar v. Moore, 88 Or. 685;
6 Corpus Juris, Sec. 740, p. 350.

III.

That Section 308 Oregon Laws is mandatory and peremptory is further shown by the language therein, which provides that

> "If judgment is recovered by the plaintiff and it shall appear that property has been attached in the action . . . the court shall order and adjudge the property to be sold."

and the construction of this statute by the Supreme Court of Oregon, holding that a failure to order a sale of the attached property is a waiver of the attachment lien.

Bremer v. Fleckenstein, 9 Or. 266;
Moore Mfg. Co. v. Billings, 46 Or. 403;

Mertens v. Northern State Bank, 68 Or. 279;
Smith v. Dwight, 80 Or. 14.

IV.

If a failure to order the sale of the property attached waives the lien of the attachment, so does a failure to enter judgment against the sureties waive recourse against the sureties.

V.

Attachment proceedings are statutory and unless the statute is strictly pursued, no right is acquired under them.

Schneider v. Sears, 13 Or. 69, 74;
Murphy v. Bjelik, 87 Or. 352;
6 Corpus Juris, Sec. 740, p. 350;

VI.

The signing of a bond to release an attachment by sureties, makes them parties and constitutes a general appearance by them.

Section 310 Oregon Laws;
Winters v. Union Packing Co., 51 Or. 97, 99;
Spores v. Maude, 81 Or 11, 17;
Anvil Gold Mining Co. v. Hoxsie, 125 Fed. 724, 728;
Roethler v. Cummings, 84 Or. 442, 448;
4 Corpus Juris, p. 1331, Sec. 25.

VII.

The judgment against Thornberry in the Circuit

Court of Sherman County, Oregon, is res adjudicata as to the sureties, the defendants in error herein, for the reason that the sureties were in court in that case as parties, and the issue in that case, namely, the liability of the sureties, is the same issue as is presented in the case at bar

Holbrook v. Investment Co., 32 Or. 106;
Beall v. New Mexico, 16 Wall. 835;
Roethler v. Cummings, 84 Or. 447 (point 9);
4 Corpus Juris, p. 1331, Sec. 25;

VIII.

The United States District Court for the District of Oregon did not have jurisdiction of this action, for the reason that jurisdiction thereof was vested in the Circuit Court of the State of Oregon, for Sherman County, which had full power and authority to grant the same relief against the defendants in error herein, as is sought in this court.

Holbrook v. Investment Co., 32 Or. 106;
Beall v. New Mexico, 16 Wall. 835;

IX.

Plaintiff in error at the time it instituted its action against H. B. Thornberry, had the choice of bringing the action in the State or Federal Court. The state court was chosen and obtained jurisdiction of the parties and the subject matter. This jurisdiction was exclusive and deprived any other court from obtaining jurisdiction.

Oh Chow v. Brockway, 21 Or. 440;

Matlock v. Matlock, 87 Or. 307, 312, 313;
Mound City Co. v. Castleman, 187 Fed. 921, 926;
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 305;
7 R. C. L. p. 1067, Sec. 105.

ARGUMENT.

Counsels' principal contentions, as we gather from their brief, may be summarized as follows:

1. The bond in this case is not the statutory bond provided in Section 311, Oregon Laws, and therefore the plaintiff could not have taken judgment against the sureties at the time judgment was entered against Thornberry.

2. That the bond, not being the statutory bond, is a common law bond, on which recovery may be had in an independent action and in a manner different from that provided in the statute.

3. That the bond is statutory only so far as it operated to dissolve the attachment, but a common law bond for the purpose of holding the sureties.

4. That conceding the bond to be the statutory bond provided in Section 311, it nevertheless is a common law bond also, and plaintiff has his option to take judgment against the sureties as provided by the statute, or sue them in another action. In other words, that the statute provides not an exclusive but a cumulative remedy.

To every one of these contentions we say that the very opposite is true. And first we contend that the bond is the statutory bond provided in Section 311, Oregon Laws, because it specifically states that it was given in compliance with Sections 310 and 311. Furthermore, it was given for the purpose of dissolving the attachment, and was accepted by the court and all the parties for that purpose, and accomplished that result.

Now, Section 311, Oregon Laws, reads as follows:

> "*Sec.* 311. *UNDERTAKING UPON APPLICATION TO DISCHARGE ATTACHMENT.* Upon such application, the defendant shall deliver to the court or judge to whom the application is made an undertaking, executed by one or more sureties, resident householders or freeholders of this state, to the effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action. If the plaintiff demand it, the sureties shall be required to justify in the same manner as bail upon an arrest."

It will thus be seen that it provides no particular form for the bond, except simply to say that it shall be to the "effect that the sureties will pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action."

The bond in the case at bar is to the effect declared in the statute. It is to the effect that the sureties will pay the plaintiff the amount of his judgment against the defendant, for it says so in so

many words. The language of the bond is, omitting for the present the two clauses "on demand" and "or in default thereof," that "we, the sureties, will pay to the plaintiff the amount of the judgment he may recover against the defendant in said action." Thus it will be seen, by eliminating these clauses, we have almost the exact language of the statute. The effect of that language cannot be changed by adding the clause "on demand." The bond is still to the effect that the sureties will pay, etc.

This court held, in EBNER v. HEID, 125 Fed. 683, in construing an attachment bond under this same statute, that a promise to pay the judgment "on demand" was equivalent to an agreement to pay the judgment if one was recovered against the defendant.

Now, the effect of the bond is not changed from that declared in the statute by the addition of the clause "or in default thereof", for that is nothing more than is implied by law in every obligation assumed by a surety. It is implied in the word "surety" itself. The surety pays if the principal defaults, and it is not a deviation from the effect of the statute to say in words what is implied by law.

The bond in this case is almost exactly like the bond construed by this court in EBNER v. HEID, supra. In that case the bond recited:

> "We, the undersigned, . . . in consideration of the premises and in consideration of the re-

lease from attachment of all the property attached as above mentioned, and the discharge of said attachment, do hereby jointly and severally undertake and promise that in case said plaintiffs recover judgment in said action, the defendant will, on demand, pay to the said plaintiffs the amount of said judgment, together with the costs and disbursements of this action."

The bond in this case is set out on pages 2 and 3 of plaintiff's brief, but for convenience we recite it here:

"WHEREAS, P. H. Buxton, Sheriff of Sherman County, Oregon, by virtue of a writ of attachment issued in said court and cause, has attached certain property of defendant's, to-wit: all the real property owned by the said defendant in said Sherman County, Oregon, and said defendant having applied to the said court upon due notice to the plaintiff, for an order to discharge said attachment and to release said property from the lien thereof, in compliance with Sections 310 and 311, Lord's Oregon Laws:

"NOW THEREFORE, in consideration of the premises, and for the purpose of the making of said order, we, the undersigned, H. B. Thornberry, as principal, and R. H. McKean, Geo. N. Crosfield, C. B. Hearing, W. A. Medler, A. D. Richelderfer, and W. N. Morse, residents and freeholders in said County and State, as sureties, undertake, on behalf of defendant, and are bound to the plaintiff in the sum of $15,000.00, and promise the plaintiff that, in case the plaintiff recover judgment in said action, the defendant will, or in default thereof, we, his sureties, will, on demand, pay to the plaintiff the amount of the judgment that he may recover

against the defendant in said action, not exceeding the amount of $15,000.00 and the costs and disbursements of said action."

Judge Bean, in comparing these bonds, held in his opinion, (Page 3 of the appendix of plaintiff's brief) that these bonds were almost exactly in the same language, and as this court held the bond in Ebner v. Heid to be the statutory bond, the learned trial judge followed that opinion. Judge Bean stated in his opinion that the bond here is "in language almost exactly the same" as the bond considered and construed by this Court in Ebner v. Heid.

Let us suppose for a moment that when the plaintiff took judgment against Thornberry it had demanded judgment against the defendants, as provided by Section 311, and the defendants had there made the same contention that plaintiff is making here. Defendants must then have said to the court: "We made this bond for the purpose of dissolving the attachment. It was accepted by the court and the plaintiff, and accomplished that purpose. We said in the bond itself that it was given in compliance with Sections 310 and 311, Oregon Laws. Section 308 says that if the property attached shall have been released by reason of the giving of the undertaking by defendant, *as provided by Section* 311, the court shall, upon giving judgment against the defendant or defendants, also give judgment, in like manner and with like effect, against the surety or sureties in such undertaking. But, notwith-

standing this provision of Section 308, we now say that the court cannot give judgment against us, for we specified in our bond that we would pay on demand, and upon defendant's default." Would not the reasoning by this court in Ebner v. Heid be a complete answer to any such claim? We think it would. It is not because of the form or language of the bond that judgment must be taken against the sureties along with the defendant, but it is the language of the statute, which says that the judgment shall be so taken. So that in any attachment bond in Oregon that is sufficient under Section 311 to dissolve the attachment, judgment must be taken against the sureties when it is taken against the defendant, or judgment against the sureties is waived. In other words, the statute is mandatory.

Section 308, Oregon Laws, being the section pertaining to the entry of judgment against the sureties on attachment, reads as follows:

> Sec. 308. *ORDER SHALL DIRECT SALE OF ATTACHED PROPERTY, WHEN.* If judgment is recovered by the plaintiff, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if there be any such property or proceeds remaining after satisfying such execution, he shall, upon demand, de-

> liver the same to the defendant; or if the property attached shall have been released from attachment by reason of the giving of the undertaking by the defendant, as provided by section 311, *the court shall upon giving judgment against the defendant or defendants, also give judgment in like manner and with like effect against the surety or sureties in such undertaking.*

The failure of plaintiff in error to enter judgment in the State Court against the sureties, waives its right to institute a new action against the sureties, who are defendants in error herein. The provisions of the statute (Section 308 Oregon Laws) are *mandatory* and *peremptory,* wherein it provides that judgment *shall be entered against the sureties at the time of the entry of judgment against the defendant.*

The statute is mandatory, first: because it appears to be such from the language employed. The statute says *"shall,"* and unless there is some other controlling consideration, such language imports a peremptory direction to the plaintiff. This direction being peremptory, if the plaintiff sees fit to forego the remedy that the statute affords it, it would necessarily follow that it could not afterwards change its mind and obtain a remedy that is not afforded by the statute.

The statute should be construed to be mandatory for a second reason: an attachment is a statutory proceeding. The bond involved in this case is a stat-

utory bond. The remedy given plaintiff on the bond is a statutory remedy. The statute must therefore be the guide and the limit as to the remedy sought. It is a well known principle in interpretation, that where a statute provides a remedy, upon a statutory obligation, that remedy thus afforded is exclusive and the statute is the measure of the court's power to render relief.

The Supreme Court of Oregon in the case of AH LEP v. GONG CHOY, 13 Or. page 431, construing Subdivision 4 of Section 559, Oregon Laws, which is as follows:

> "If judgment or decree be given against the appellant, it shall be entered against his sureties also, in like manner and with like effect, according to the nature and extent of their undertaking."

uses the following language:

> *"The language of the provision is peremptory, and is subject to no exceptions that we are able to discover."*

In the case of McCARGAR v. MOORE, 88 Or. 682, on page 685, the court quotes from 6 CORPUS JURIS, Section 740, page 350, as follows:

> "Statutes authorizing summary remedies on forthcoming, delivery or dissolution bonds are to be strictly construed, and are available only where the bond is such as the statute contemplates; and one who seeks to enforce the liability of the obligors in this manner must comply, at least substantially, with the requirements of the statute in respect to all things

which must be done in order to make the statutory remedy available."

The statute is mandatory for a third reason: prior to 1907, there was no statute of Oregon providing any remedy upon an attachment bond. The plaintiff was therefore relegated to a common law action. In 1907, the Legislature amended the statute which was then Section 309, Bellinger & Cotton's Code, to provide that judgment be entered against the sureties at the time of the entry or judgment against the defendant in the main action. The purpose of this amendment must be deemed to be two-fold: First, to prevent a circuituity of actions, so that complete relief against both defendant and his sureties could be afforded in one proceeding. Second, to prevent the imposition of double costs on the sureties. Formerly, they were obliged under their bond to pay the costs of the original action, and in a subsequent action upon the bond they would be compelled to pay costs again. The statute also afforded the sureties the right to immediate subrogation to their principal, so that they would not be in such a position as the sureties may find themselves in a case similar to the one at bar, where they are called upon to pay a judgment long after recovery of judgment against their principal.

The postponement of subrogation or recourse by a surety against his principal is recognized to be a detriment. This principle, as is well known, is carried so far in its operation as to release a surety

where the debt for which he is surety has been prolonged without his consent. Therefore, since the amendment must be supposed to be for the benefit of the sureties, as well as of the plaintiff, the sureties have an interest in having the judgment rendered against them in the principal action, rather than in a subsequent action. The statute must be construed to be mandatory, because if it were otherwise, the plaintiff would have the option to disregard its provisions to the detriment of the sureties.

The statute is mandatory for a fourth reason: the said statute, Section 308, Oregon Laws, directs that the judgment shall order the sale of the attached property. The court has held many times that a failure to order a sale of the attached property releases the lien of the attachment. As Judge Bean has held in his opinion, *the bond to discharge the attachment is a substitute for the attached property.* It would logically follow that the failure to enter judgment against the sureties is a waiver of recourse against them. Both the direction as to the sale of the property and the entry of judgment against the sureties being in the same section in the same sentence, and made to accomplish the same purpose, they should be construed alike.

The Supreme Court of Oregon in the following cases has held *that the attachment is waived by a failure to order the sale of the attached property*:

Bremer v. Fleckenstein, 9 Or. 266;

Moore Mfg. Co. v. Billings, 46 Or. 403;
Mertens v. Northern State Bank, 68 Or. 279;
Smith v. Dwight, 80 Or. 14.

In the case of MERTENS v. NORTHERN STATE BANK, 68 Or. 281, the court lays down this rule:

> "When property is attached and the court in entering judgment for the plaintiff, fails to enter an order for the sale of the attached property, the failure to make such order operates as a waiver and discharge of the attachment lien."

If a failure to order the sale of the attached property waives the lien of the attachment, so does a failure to enter judgment against the sureties waive recourse against the sureties.

The bond to discharge the attachment is a substitute for the attached property. If the attached property is released by reason that the judgment entry fails to order the attached property sold, then it follows that if the judgment order fails to take judgment against the sureties on the bond, which stands in lieu of the attached property, then the sureties are released from their liability thereunder.

In a number of cases the Supreme Court of Oregon, starting with the case of SCHNEIDER v. SEARS, 13 Or. 69, 74, and as late as the case of MURPHY v. BJELIK, 87 Or. 329, 352, has laid down the rule *that attachment proceedings are statuatory and unless the statute is strictly pursued, no right is acquired under them.*

The same rule is laid down in 6 CORPUS JURIS, Section 740, page 350, and hereinbefore fully set forth.

That the signing of a bond to release an attachment by sureties makes them parties and constitutes a general appearance by them, has been held many times by the Supreme Court of Oregon.

In the case of WINTERS v. UNION PACKING CO., 51 Or. 97, on page 99, Justice Robert S. Bean says:

> "But where a defendant appears and invokes the judgment of the court upon a matter, which presupposes jurisdiction, or asks relief which can only be granted after jurisdiction has attached, his appearance is general, and gives the court jurisdiction of the person, whether limited to a special purpose or not. The character of the appearance does not depend upon the form of the motion or pleading, but upon its substance, and the relief sought: Belknap v. Charlton, 25 Or. 41 (34 Pac. 758)."

Under the statutes of Oregon, before a defendant may apply to the court for an order discharging an attachment, he must appear in the action. Section 310, Oregon Laws, pertaining to the discharge of an attachment, reads as follows:

> Sec. 310. *MOTION ..TO ..DISCHARGE ATTACHMENT.* Whenever the defendant shall have appeared in the action, he may apply, upon notice to the plaintiff, to the court or judge where the action is pending, or to the

> clerk of such court, for an order to discharge the attachment upon the execution of the undertaking mentioned in the next section; and if the application be allowed, all the proceeds of sales, and property remaining in his hands, shall be released from the attachment and delivered to the defendant, upon his serving a certified copy of the order on the sheriff."

The case of ANVIL GOLD MINING CO v. HOXSIE, 125 Fed. 724, which is a decision of the Circuit Court of Appeals of the Ninth Circuit, lays down the rule that the signing of the bond to release an attachment is a general appearance. The case was appealed from the District of Alaska. It involved the construction of Section 150 of the Alaska Code, which is the same as Section 311, Oregon Laws (Olson). The court in its opinion on page 728, says:

> "It may be admitted, for the purposes of this case, that when the defendant in an attachment suit under the Alaska Code gives the undertaking provided in Section 150, he waives his right to question mere irregularities and defects apparent upon the face of the original attachment proceedings."

In the case of ROETHLER v. CUMMINGS, 84 Or. 442, which was a case involving the question as to whether the giving of the undertaking to discharge an attachment (310 Oregon Laws) was a general appearance, uses the following language on page 448:

> "Such an instrument was delivered to the Justice's Court upon an application of the defendants to discharge the attachment in the

proceedings in question and obligated the sureties to pay any judgment that might be rendered against the defendants. Based thereon the property of the defendants was released from attachment. Such a procedure bound them to enter an appearance as contemplated by Section 310, L. O. L., or be proceeded against as in case of personal service. Unlike the undertaking for a re-delivery or forthcoming bond provided for in Section 305, to be given to the attaching officer, the application to discharge the attachment invokes the judgment of the court upon a matter which presupposes and acknowledges the jurisdiction of such tribunal, or asks for relief which can be granted only after jurisdiction has been acquired. Such an appearance by defendants was a general one and gave the Justice's Court jurisdiction of their persons. The character of the appearance does not depend upon the form of procedure, but upon its substance and the relief sought:

WINTER v. UNION PACKING CO., 51 Or. 97 (93 Pac. 930); SPORES v. MAUDE, 81 Or. 11, 17 (158 Pac. 169); ANVIL GOLD MIN. CO. v. HOXSIE, 125 Fed. 724, 728, (60 C. C. A. 492); 4 C. J., p. 1331, Sec. 25, where it is stated:

> 'The giving of a bond operating as a discharge or dissolution of an attachment or garnishment operates as an appearance converting the action from one *in rem* into one *in personam.*' "

If judgment could have been rendered against the sureties in the State Court at the time it was rendered against the defendant, H. B. Thornberry, that would be because the effect of their signing the bond would make them parties to the cause and

operate as a general appearance by them. They would submit themselves to the jurisdiction of the State Court, demanding relief. i. e., the discharge of the attachment. They should be regarded therefore as parties to the cause who have made a general appearance.

If we are correct in our contention, that the signing of the bond made the sureties parties and constituted a general appearance by them, then the judgment rendered in such a cause would be conclusive as to all of the parties In any case, where a plaintiff sues more than one person, all of them appearing generally, a judgment rendered against one of the defendants is a bar in favor of all the other defendants.

Inasmuch as the State Court had jurisdiction to render a judgment against the sureties, then they must have filed a general appearance in the State Court in order for the court to be authorized to render and enter a judgment against them.

We have already shown conclusively, that the language used in Section 308, Oregon Laws, is mandatory and peremptory. If the language in said statute is mandatory, directing that judgment shall be entered against the sureties in the main action, it would necessarily follow that the Federal Court would not have jurisdiction of the action at bar. Whatever judgment would have been rendered in

the State Court would be *res adjudicata,* as to all the parties against whom judgment could have been rendered.

The issue in the case in the State Court, namely the liability of the sureties, is the same issue as is presented in the case at bar.

Since the amendment of 1907 to Section 308, Oregon Laws, there has been no decision in Oregon on the question as to whether or not the remedy given the plaintiff against the sureties in the original action is exclusive. However, we find the question practically decided upon the construction of the statute concerning appeal bonds, Section 554, Oregon Laws, Subdivision 3, (541 Hills, Subdivision 3), which reads as follows:

> "If the appeal be abandoned as provided in Subdivision 2 of this section, thereupon the judgment or decree, so far as it is for the recovery of money, may, by the appellate court, be enforced against the sureties in the undertaking for a stay of proceedings, as if they were parties to such judgment or decree."

The Supreme Court of Oregon, in construing this language in HOLBROOK v. INVESTMENT COMPANY, 32 Or. 104, 106, and following, holds that such language is a direction to the court to enter judgment against a surety, and that the signing of the undertaking by the surety makes the surety a party to the original cause, and is an appearance by him.

In the Holbrook v. Investment Co. case, supra, the following language of Mr. Justice Bradley in BEALL v. NEW MEXICO, 16 Wall. 535, is quoted:

> "A party who enters his name as surety on an appeal bond does it with full knowledge of the responsibilities incurred. In view of the law relating to the subject, it is equivalent to a consent that judgment shall be entered up against him if the appellant fails to sustain his appeal."

We have heretofore in our brief cited the rule from 4 CORPUS JURIS, page 1331, Section 25, which holds that the giving of the undertaking discharging the attachment operates as an appearance and converts the action from one *in rem* to one *in personam*.

Plaintiff in error elected to take judgment in the State Court against the defendant, H. B. Thornberry, only, and not against the sureties who had appeared generally, and who had submitted themselves fully to the jurisdiction of said court. Plaintiff is thereafter barred from instituting a new and separate action against the sureties, involving the same issues as were decided when it entered its judgment against H. B. Thornberry. The failure to obtain a judgment against the sureties deprives any other court in any other cause of the power to render another judgment. *The former judgment is an adjudication.*

The District Court of the United States for the District of Oregon, did not have jurisdiction of the

subject of this action. The Circuit Court of Sherman County, Oregon, had jurisdiction of the persons and the subject of this action, and had full power and authority to make the same adjudication against the sureties, the defendants in error herein, as is sought in the present action. Where a state court has jurisdiction of a cause and of the parties, that jurisdiction is exclusive, and a Federal Court cannot obtain jurisdiction of the case except in the manner provided by law, i. e., by their removal of the cause prior to appearance and the giving of a bond.

We have heretofore conclusively shown that the signing of the bond to discharge the attachment by the sureties constituted a general appearance by them.

IN the case of HOLBROOK v. INVESTMENT CO., 32 Or. 104, the court says on page 107:

> "When judgment is entered against a party it must be conceded that it would bind him if the court rendering the judgment had jurisdiction of his person and of the subject matter of the suit or action; and, such being the case, our statutes above referred to in effect provide that when the surety signs an undertaking on appeal and for a stay of proceedings he forms a privity of contract with the judgment debtor, and like his principal, *thereby becomes a party to and is bound by the judgment.*"

The state court had jurisdiction of the plaintiff in error, in the cause in Sherman County, Oregon, it being the plaintiff in this cause. The state court

had jurisdiction to render judgment against the sureties in the cause in the state court, they being in effect defendants in that court and being defendants in error in this cause. The state court had power to render the same judgment and for the same cause against the sureties in the state court as is sought to be recovered against the same parties, the defendants in error in this cause.

The Supreme Court of Oregon, in the case of MATLOCK v. MATLOCK, 87 Or. 307, on page 312, uses the following language:

> "It is a familiar principle that when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority continues subject only to the appellate authority until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action. This principle is essential to the proper and orderly administration of the law and in order to avoid conflict in the rendition of final decrees. While its observance might be required on the grounds of judicial comity and courtesy it does not rest upon such circumstances exclusively, but it is usually enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and of process."

The court in the latter case cites 7 R. C. L., page 1067, Section 105, which lays down the following rule:

> "It is a familiar principle that, when a court of competent jurisdiction acquires jurisdiction of the subject matter of a case, its authority

continues, subject only to the appellate authority, until the matter is finally and completely disposed of, and no court of co-ordinate authority is at liberty to interfere with its action. This doctrine is applicable both to civil cases and to criminal prosecutions. The principle is essential to the proper and orderly administration of the laws; and while its observance might be required on the grounds of judicial comity and courtesy, it does not rest upon such considerations exclusively, but is enforced to prevent unseemly, expensive and dangerous conflicts of jurisdiction and process. If interference may come from one side, it may come from the other also, and what is begun may be reciprocated indefinitely. An essential condition of the application of the rule as to priority of jurisdiction is that the first suit shall afford the plaintiff in the second an adequate and complete opportunity for the adjudication of his rights, for the rule that the court first acquiring jurisdiction retains it to the end must yield to the higher principle which affords to every citizen the right to have a hearing before a court of competent authority."

In the case of MOUND CITY CO. v. CASTLEMAN, 187 Fed. 921, on page 926, the court said:

> "In a suit between the same parties or those in privity with them upon the same claim or demand a decision upon the merits is conclusive, not only as to every matter offered but as to every matter which might have been offered to sustain or defeat the claim or demand."

The judgment against Thornberry rendered in the state court, was and is a decision upon the merits of the case in the state court and is conclusive

as far as the defendants in error are concerned. They were parties to the action in the state court. The issue in the state court, namely, the liability of the sureties, was and is the same issue as is presented in the case at bar. The decision of the state court is conclusive of every matter which might have been offered to sustain the claim or demand, namely, the right and opportunity to have taken a judgment against the sureties at the same time plaintiff took judgment against H. B. Thornberry.

The Supreme Court of the United States in the case of HEIDRITTER v. ELIZABETH OIL CLOTH CO., 112 U. S. 294, on page 305, said:

> "It is merely an application of the familiar and necessary rule, so often applied, which governs the relation of courts of concurrent jurisdiction, where, as is the case here, it concerns those of a state and the United States, constituted by the authority of district government, though exercising jurisdiction over the same territory That rule has no reference to the supremacy of one tribunal over the other, nor to the superiority in rank of the respective claims, in behalf of which the conflicting jurisdictions are invoked. It simply requires, as a matter of necessity, and therefore, of comity, that when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction."

The plaintiff in error in instituting the action in the state court and attaching the property of the

defendant, H. B. Thornberry, waived its right to Federal jurisdiction. The defendants in error, in signing the undertaking discharging the attachment in the state court, and thereby becoming parties to the action in the state court, subjected themselves to the jurisdiction of the state court and waived their right to removal to the Federal Court.

It would necessarily follow that the Federal Court has not jurisdiction to determine a controversy which the state court has already had before it for determination and which it has fully and finally adjudicated.

We respectfully submit that the judgment of the District Court should be sustained and affirmed

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PLOWDEN STOTT,

Attorneys for Defendants in Error.

No. 3911

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIRST NATIONAL BANK OF ANTIOCH (a corporation),

Plaintiff in Error,

vs.

R. H. McKEAN, GEO. N. CROSFIELD, C. B. HEARING, W. A. MEDLER, A. D. RICHELDERFER and W. N. MORSE,

Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

FRANK W. STREET,
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Attorneys for Plaintiff in Error.

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Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for defendants in error at the oral argument quote us as having admitted that the bond filed by the defendants in error in the action against Thornberry in the State Court was a consent that the said Court might enter judgment against the sureties therein.

They apparently misunderstood our position.

We do not so admit. We very earnestly assert that this undertaking which is a promise by the sureties that they will pay any judgment the plaintiff shall recover against Thornberry upon demand,

cannot by any means be construed to be a consent to the entry of a judgment against them at the time the judgment was entered against Thornberry. The authorities cited in our opening brief clearly establish that under the terms of *this* bond no obligation of the sureties existed until the Court had entered judgment against Thornberry and until *demand* had been made upon them for its payment.

The power of the Court under Section 308 to enter a summary judgment against the sureties at the time of the entry of the judgment against the defendant depends upon the promise of the surety to pay the judgment and, logically, that promise must be a contract to pay that judgment the instant it is entered. There must be a debt of the defendant and a debt of the sureties coming into being at the same time. This would be true had the bond contained an unqualified promise on the part of the sureties to pay the judgment. *It is not true* when they promise to pay the judgment only *after demand made therefor, or at some other future time.*

In order to make the sureties liable to a judgment there must certainly have been *an obligation with which they were charged.* No such obligation on their part existed when the state Court entered the judgment against Thornberry. The obligation of the surety did not arise until the demand was made and the demand could not be made for the payment of the judgment *until there was a judgment payment of which could be demanded.*

Consequently the *only remedy* against these sureties *was by action.*

We think the foregoing will remove any possible doubt as to our contention in this regard.

Passing now to the argument of counsel for the defendants in error, it is contended that the bond is statutory because it specifically states it was given in compliance with Sections 310 and 311. A new and more careful reading of the preamble of the bond than we have heretofore made convinces us that *it does not so state.* The bond says that the defendant *has applied for a release of the attachment in compliance with these sections.* It does not say that the *bond is in compliance therewith.*

The practice is this: defendant gives notice that he will apply for an order discharging the attachment. When the application comes on for hearing the defendant presents his bond. If it is accepted the attachment is discharged.

The recital in the bond is merely to the effect that the defendant has given the notice and made his motion for the discharge. It then goes on to say that "for the purpose of making the order" the sureties make the promise. It has been pointed out that the promise made was not a sufficient promise to have empowered the state Court to enter judgment under Section 308 against the sureties.

What occurred in the state Court was simply this: defendant made his motion for a release of the attachment as provided by the statute but when he

presented his bond he did not present a bond which was in compliance with Section 311. This is exactly the condition which existed in the case of Gardiner v. Donnelly, 86 Cal. 367 and is also the precise condition which brings the bond within the definition of a common law bond. (9 C. J. 32, p. 19 of our Opening Brief.)

The rule that a bond not in strict accord with a statute is yet valid as a common law bond, as a simple contract between the parties thereto, is so well settled that this in itself is a complete answer to the contention of Judge Littlefield in his oral argument that because plaintiff did not object to the form of the bond it is estopped from asserting that it is not in compliance with the statute. Plaintiff in error is here asking that it be enforced as a common law bond and said plaintiff has complied with each of its conditions as a precedent to bringing this action.

Counsel assert that this bond "is to the effect that the sureties will pay the plaintiff the amount of this judgment".

If we borrow from Jones $10 and give him a contract in writing saying: "We have this day borrowed from you $10 and we promise to the effect that we will pay it back to you" we very clearly promise to pay it forthwith. An action will lie on the contract immediately. On the other hand, if we borrow from Jones $10 and give him a contract saying: "We have this day borrowed from you $10 and we promise to the effect that we will pay it back

to you *one year from date"*, equally clearly we do not owe Jones the $10 until the end of the year. An action brought at any time previous to the year is premature.

The argument of counsel asserting that a bond to the effect that the sureties will pay *the judgment* is the same thing as a bond to the effect that they will pay *a judgment on demand* is preposterous.

The importance of the provision that the sureties will pay *on demand* is sustained by undisputed authority. The sureties are entitled to stand on the precise terms of their contract. (Pierce v. Whiting, 63 Cal. 538.)

The distinction between the bond here and the bond in Ebner v. Heid is plainly pointed out in our opening brief at pages 14 to 18, inclusive.

Referring to the figurative statement on page 12 of the brief of defendants in error permit us to again point out that the bond does not recite that it is a compliance with Section 311.

And further, permit us to point out that had the Circuit Court of Sherman County entered a judgment against the sureties on this bond they would undoubtedly have appealed from that judgment as the surety did in McCargar v. Moore (88 Or. 682, 157 Pac. 1107) and that the Supreme Court of Oregon undoubtedly would have held that the judgment was entered against them at a time when they did not under the precise terms of their bond owe plaintiff one cent and that said judgment was therefore void as to them.

And here we think it *apropos* to state that we have directed the course of plaintiff in this matter, and that prior to the entry of the judgment against Thornberry we gave our careful consideration to the provisions of the Oregon law which we are now discussing and refrained from asking the Circuit Court to enter a summary judgment against the sureties for two reasons: first, because we believed such a judgment against them would have been invalid, and, second, because we had before us Corpus Juris, and having first convinced ourselves that the Supreme Court of Oregon *had never* held that an action on a bond such as this *would not lie,* we relied upon the principle announced at page 351, par. 741 of vol. 6 Corpus Juris, together with the decisions cited thereunder and which are cited in our opening brief (pp. 27-29) as announcing the correct rule of law. Nothing that has since developed in this matter has shaken our conviction that we were absolutely right and we feel that the judgment of the District Court herein is most grievous error.

The right of the Court to enter a summary judgment does depend on the nature of the contract of the surety. This contract must be a promise to pay that judgment without any qualification for the statute will be *strictly construed in favor of the surety.* McCargar v. Moore, *supra.* Not having the right to a summary judgment we sought relief by this action on the bond.

We now turn to the question as to whether Section 308 is mandatory.

Counsel contend that the statute is mandatory because it says "shall".

The statute of Iowa quoted on page 27 of our opening brief distinctly uses "shall" and the Supreme Court of Iowa distinctly holds that the *statutory remedy is not exclusive.* (State v. McGlothlin, 16 N. W. 137.)

The State of Alabama has a statute providing for the summary entry of judgment against sureties on an appeal bond. It reads as follows:

> "When, on appeal or certiorari, the judgment is affirmed, judgment *must* be rendered by the court against the sureties as well as the principal, which must include the costs of the inferior and appellate court."
>
> Section 4725, Alabama Civil Code.

The word *must* is more mandatory in its nature than *shall.* The Supreme Court of Alabama in Jaffe v. Fidelity & Deposit Co., 60 So. 966, said:

> "The mere fact that the bond is good as a statutory bond and enforceable in the method provided by statute does not of itself prevent recourse to a common law action for its enforcement."

See also

> James v. Harry Kitziner Co. (Ala.), 68 So. 582.

The Oregon statute is not mandatory because it uses the word *shall.*

Counsel next contend that this statute is mandatory because this bond was given in an attachment

proceeding. An attachment and the lien afforded thereby arises *only by statute*. This bond, this simple written contract to pay money, does not arise out of statute. (See pp. 23-27 our opening brief.)

> "The plaintiff could have maintained an action on the bond if none (i. e., no remedy) had been provided by statute. The latter, therefore, is merely an additional remedy."
>
> State v. McGlothlin, *supra*.

In support of their assertion that Section 308 Oregon Laws is mandatory counsel cite Ah Lep v. Gong Choy, 13 Or. 431.

Oregon has a statute providing that when a judgment is rendered in the trial Court an appellant may have a stay of execution if he gives a bond for the payment of the judgment in event the judgment appealed from be affirmed or the appeal dismissed. There is a further provision for the summary entry of judgment against the sureties which provision is quoted on page 15 of the brief of defendants in error.

In the case just mentioned judgment was not given against the sureties. The respondent caused the mandate to be returned to the Supreme Court where it was corrected by giving judgment against the sureties. The appellant then sought to have the judgment against the sureties vacated.

The Court said that:

> "The language of the provision is peremptory and is subject to no exceptions that we are able to discover"

and held:

> "The respondent is therefore entitled to have his judgment entered against the sureties upon the appeal."

The decision of the Oregon Court in this case amounts to nothing more than a statement that it was authorized by the law and the bond in that case to give judgment against the sureties. The question as to whether or not the respondent, instead of asking the Court to correct the judgment could not have maintained an action on the bond was not before the Court and the Court does not pretend to either discuss or decide that question.

As a matter of law, the respondent in Ah Lep v. Gong Choy could have brought an action on his bond instead of asking the Supreme Court to correct its mandate by giving him the summary judgment. It is so held in the Alabama cases heretofore cited.

Permit us again to call attention to the use of the word *shall* in the Iowa law and the use of the word *must* in the Alabama law. Both words are decidedly *peremptory* but the statutes are not held to be mandatory in the sense that the "statute must be the guide and the limit as to the remedy sought".

A number of the states have statutes providing for the summary entry of judgment against sureties on appeal bonds and in *not one instance* has it been held that the statutory remedy is exclusive.

In State v. Boies, 41 Me. 344, the Supreme Court of Maine holds:

> "The second objection relied upon is, that the statute having provided in the 24th section a *specific* remedy for a breach of the condition of this recognizance, an action of debt will not lie therefor, and that such remedy alone can be pursued. The Court are of the opinion, that the remedy authorized by the peculiar provisions of this statute like that of *scire facias*, is only cumulative to that which the common law affords."

In Cockrell v. Owen, 10 Mo. 287:

> "Although judgment might have been entered on the recognizance on the trial in the Circuit Court, yet that does not seem to be the sole remedy. The condition of the recognizance shows that there may be cases in which the remedy cannot be employed. By the common law debt and *scire facias* were concurrent remedies on all recognizances. When the Legislature creates such instruments, those remedies tacitly attach to them, and although another may be given, there is no principle on which they can be denied. The law is harmonized by regarding the remedy given on the trial of the appeal as merely cumulative."

The Supreme Court of Texas in a most careful opinion says:

> "It is claimed that the statutory remedies upon the bond, which in Texas meet all the phases of liability are exclusive. But no case cited and none found sustains this doctrine. In Louisiana the sureties upon the bond are reached by a summary proceeding in the lower court. (Wilson v. Churchman, 6 La. Ann. 486.) And in Smith v. Gaines, 93 U. S. 341, it was

held that this remedy might be used in the federal circuit court in that state as a substitute for an independent suit on the bond; but there is no intimation anywhere that the judgment creditor may not waive the summary proceeding prescribed for his benefit, and pursue his common law remedy upon the bond. In Ohio the statute provides a remedy for the appellee in every case, except the dismissal of the appeal or the affirmance of the judgment and expressly authorizes suit on the bond in those two cases. This is held to be a statutory denial of the right to an independent suit in all other cases. On the other hand the bond being a contract, for the breach of which the comon law furnishes the forms and means of redress, the general principle is that statutory remedies are not exclusive. (2 Wait; Act and Def. 42, 286; Candee v. Hayward, 37 N. Y. 653.) In Lobdell v. Lake, 32 Conn. 16, in a suit upon an appeal bond it was held that the surety was liable although the statute provided another remedy for the very breach alleged. In State v. Bois, 41 Me. 344, the statute prescribed a specific remedy for the breach of a recognizance on appeal, but it was held that the obligee was not deprived of the right of an independent suit. The judgment on the bond in the appellate court—the validity of a law authorizing such judgment was affirmed on question, in Beall v. New Mexico, 16 Wall. 539, and summary proceedings against sureties are provisions for the benefit of the appellee or defendant in error, and whether beneficial or not, would be problematical if the obligee was confined to the statutory remedy in all cases. The object of law as well as the ends of justice, is best accomplished by holding that these remedies are cumulative, consistently with the enlightened precedents and the general principles of construction already noticed."

Trent v. Rhomberg (Tex.), 18 S. W. 510.

In a case decided in 1918 the Supreme Court of Washington held:

> "It seems to be well settled law that whatever statutory right a successful party upon an appeal may have to a summary judgment rendered by the appellate court against sureties upon a supersedeas bond in connection with the final disposition of the case by the appellate court is a remedy merely cumulative of the common law remedy, and does not affect the right of such successful parties to maintain an independent action upon such a bond in lieu of such statutory remedy."
>
> Empson v. Fortune, 172 Pac. 873; 2 R. C. L. 319.

> "On the breach of the condition of a valid and sufficient appeal bond or undertaking, the liability of the principal and surety may be enforced by an action on the bond. Summary remedies given by statute are regarded as cumulative, and do not deprive the obligee of the right to bring an action on the bond."
>
> 4 Corpus Juris, p. 1297, par. 2416.

The language of 2 Ruling Case Law 319, cited in the Washington decision, is as follows:

> "The ordinary common-law actions for the enforcement of bonds may of course be resorted to, and the statutes providing a summary remedy on appeal bonds are regarded as cumulative and do not affect the right to maintain such actions."
>
> "The contract of sureties on an appeal bond is entirely distinct from and independent of the judgment."
>
> "Since the undertaking of a surety is not a collateral one, but an absolute one to pay, the time for bringing an action on such an under-

> taking is regulated not by that part of the statute of limitations which relates to actions on *judgments,* but by the part which relates *to actions* on sealed instruments *for the payment of money.*"

In answer to the third reason upon which counsel urge Section 308 Oregon laws is mandatory we call attention to the language of the Supreme Court of Texas in Trent v. Rhomberg, *supra,* wherein it says that

> "summary proceedings against sureties are provisions for the benefit of the appellee."

Clearly, the provision for a summary judgment upon a release of attachment bond is for the benefit of the plaintiff and he may waive it and resort to his action on the contract.

As to the matter of double costs, however, it may be suggested that the defendants in error could have effectually avoided the costs of this action as well as the costs in error, if they had paid plaintiff in error the amount it seeks to recover in this action when that amount was demanded of them.

As to their recourse against Thornberry, they will have this when they have paid the judgment as they have promised to do and not before. It is by no means the fault of the plaintiff in error that they did not pay their debt when it was demanded of them. The plaintiff in error made formal demand that they pay it and they refused to do so.

Section 2847 of the Civil Code of California is but a re-enactment of the common law. The rule is universal and is as follows:

> "If a surety *satisfies* the principal obligation, or any part thereof, whether with or without legal proceedings, the principal is bound to reimburse what he has disbursed."

Defendants in error have never had any recourse against Thornberry because they have not paid this judgment. If they have suffered any detriment on this account since January 12, 1922, they alone are to blame for that. Had they paid the judgment when it was demanded of them there would have been no delay in their recourse. Counsel are most unreasonable when they complain of us for this situation.

The fourth reason in which it is asserted this statute is mandatory involves the matter which misled the District Court. (p. 17 of the brief of defendants in error.)

Section 308 Oregon laws provides for two separate and distinct remedies. The first is the plaintiff's remedy in the enforcement of the attachment lien. The attachment lien is a creature of the statute. It did not exist at common law nor is any remedy provided by the common law for its enforcement. Therefore in the enforcement of the *statutory lien* the plaintiff is confined to the *statutory remedy. The common law provides abundant remedy for the enforcement of the bond,* the simple contract of the sureties to pay money, and therefore the *plaintiff is not confined to the statutory remedy.*

The rule announced by the Supreme Court of Oregon in the decisions cited on pages 17 and 18 of the brief of the defendants in error is quite correct. But to hold to the same effect in the matter of the remedy against the sureties is to hold contrary to a principle long ago firmly established.

The true rule of law is well stated in Cockrell v. Owen, *supra,* as follows:

> "By the common law debt and *scire facias* were current remedies on all recognizances. When the legislature creates such instruments those remedies tacitly attach to them, and although another may be given there is no ground upon which they can be denied. The law is harmonized by regarding the remedy given on the trial of the appeal as merely cumulative."

In Jaffe v. Fidelity & Deposit Company, *supra,* it is said:

> "The general rule is that a special remedy given by statute is cumulative, and not exclusive of the ordinary jurisdiction of the courts, unless the manifest intention of the statute is to make such special remedy exclusive *and such intention must be manifested by affirmative words to that effect.*"

This same principle is stated in Smith v. Fargo, 57 Cal. 157.

Section 308 Oregon laws *does not provide in affirmative words that the remedy by summary judgment is exclusive.*

We agree with the cases cited on page 18 of the brief of the defendants in error to the effect that attachment proceedings are statutory.

We are not, in this action, seeking to enforce a statutory right; we seek to enforce the contract of the defendants in error to pay us a sum of money.

Counsel for defendants in error assert that the signing of the bond makes the sureties parties to the action. All of the cases cited in their effort to support this assertion are found under VI of their brief (page 6). We have examined them.

Winter v. Packing Co. holds that when the *defendant* makes a motion to release the attachment under Section 310, *he, the defendant,* makes a general appearance in the action and thereafter it proceeds as an action *in personam* and not as an action *in rem.*

In Spores v. Maude it was held that under the peculiar circumstances of that case a motion to dissolve an attachment upon the ground that it was improperly issued in an equity suit did not constitute a general appearance, the defendant having appeared specially for the purpose of making that motion.

Anvil Gold Mining Co. v. Hoxie and Roethler v. Cummings are to the same effect as Winter v. Packing Co.

In none of these cases did the Court discuss or attempt to discuss in *any manner whatsoever* the status of the surety upon a release of attachment bond in the light of determining whether or not he was to be deemed a party to the action.

The only case we are able to find bearing directly upon this question is Charleston Bank v. Moore, 6 Ga. 416, where it is held

> "The surety on appeal is *never treated as a co-ordinate party* during the progress of the suit. He is not known to the record as such. He is never notified of amendments to the pleadings, or to the filing of interrogatories. His death does not suspend the action.
>
> It is true that the act of 1826 allows the plaintiff to enter up judgment against the principal and surety on appeal, jointly or severally. But this is cumulative and permissive only, not imperative. He may do it or else, if he sees fit, pursue his common law redress by writ of *scire facias* or action of debt on the bond."

Manifestly counsel *are not correct* in their contention that the signing of the bond made the sureties parties to the action and constituted a general appearance by them.

It is also difficult to understand how the release of Thornberry's property was any *relief* to them as asserted.

In the case of Holbrook v. Investment Company, cited by counsel on page 25 of their brief, the contention of sureties on an appeal bond was that the Court could not enter a judgment against them because they would be thereby deprived of their day in Court.

The Court held that under the Oregon law it had power to enter judgment against them. It did not base its right to enter judgment against them upon

the ground that they were *parties to the action.* It simply held, following Beall v. New Mexico, that when they gave their bond to pay the judgment they had formed a *privity of contract* with the respondent and that there was an implied consent that the judgment should be so entered. The Court said that they became *parties to* and were bound by the *judgment.* In the case of an appeal bond the bond is not given until there is a judgment entered. In this case there was no judgment when the present bond was filed. If the Court in the Sherman County case had entered judgment against them at the same time it entered judgment against Thornberry they would have then been parties to the judgment. Such a judgment was never entered. So in this case the sureties were never parties to the action nor were they ever parties to the judgment. Their status in the Sherman County case was that of *mere sureties* and nothing more.

We think the facts and the law applicable to this case are so plain that there can be no doubt but that the state Court had no right to enter judgment against these sureties and that our only remedy was by action.

We think the law is established beyond all question that whether the Sherman County Circuit Court did or did not have the right to enter judgment against the sureties that the plaintiff had the right at law to choose either to seek relief on this bond by the statutory remedy or by the remedy of the action on the bond, as it desired.

The statement in IX, page 7 of the brief of defendants in error, is correct, but the only parties to the action in the state Court were the *plaintiff in error here and H. B. Thornberry.*

If, after plaintiff in error had brought the action against Thornberry in the state Court it had then brought another action having the same object and over the same subject matter in District Court of the United States in and for the district in which Thornberry was a citizen and resident, while the action in the state Court was still pending the District Court would have then had no jurisdiction. This is the rule announced by decisions cited on pages 7 and 8 of counsels' brief. They have no bearing on this case whatsoever.

In closing we desire to say that in no case in Oregon has it been held that an action may not be maintained against the sureties on either a release of attachment bond or upon an appeal bond; that in every state in this country which has either a statute providing for the summary entry of judgment upon a release of attachment bond or upon an appeal bond that it has been held, universally and without exception, that the summary remedy and the remedy by action on the bond are concurrent remedies and that either the one or the other may be selected by the plaintiff as he chooses.

It thus must follow that this action being one for the recovery of a sum of money in excess of $3000 due from the defendants in error to the plaintiff in error upon a simple contract based upon a sufficient

consideration, plaintiff being a citizen of California and defendants being citizens of Oregon, that the District Court of the District of Oregon has jurisdiction of the persons of the defendants, of the subject of the action; that plaintiff has the legal capacity to sue and that its complaint states a cause of action.

"Undertakings given on suing out writs of attachments; undertakings given to *secure the discharge of attachments;* undertakings to obtain orders of arrest; undertakings to secure release from imprisonment thereunder, supersedeas bonds and undertakings on appeal; bonds given on the allowance of a writ of injunction; bonds given by the plaintiff, and also bonds given by the defendant in replevin actions, to obtain possession *pendente lite* of the property in controversy,—all these and other obligations given in the course of judicial proceedings *may,* in the absence of some statute to the contrary, *be sued on in any court having jurisdiction of actions on contract involving a like amount.*"

Braithwaite v. Jordan, (N. D.) 65 N. W. 701.

We respectfully submit that the judgment of the District Court should be reversed and said Court directed to overrule defendants' demurrer to plaintiff's complaint.

Dated, San Francisco,
October 18, 1922.

FRANK W. STREET,
HORACE M. STREET,
Attorneys for Plaintiff in Error.

No. 2913

United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

JOSEPH F. BURCH, JR.,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

PARKER & STONE CO., Law Printers, 232 New High St., Los Angeles, Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys:

For Appellant:

WILL J. THAYER, Esq., 462 Spreckels Bldg., San Diego, Calif.

For Appellee:

PATTERSON SPRIGG, Esq., 512 Southern Title Bldg., San Diego, Calif.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION.

IN THE MATTER OF MASON and OWEN, Bankrupts.) (PETITION.

TO THE HONORABLE, THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION:

The petition of Joseph F. Birch, Jr., resident of San Diego, San Diego County, California, respectfully shows:

That prior to the 3rd day of November, 1920, he was the owner, in possession of, and entitled to the possession of certificates of stock numbered 69806, 69807, 69808 for three hundred shares of stock in the Ray Consolidated)Copper) Company.

That on said last-named date, petitioner delivered said shares of stock to the said Mason and Owen, at their place of business at Number 1032-4th Street, in the City of San Diego, California, for which said stock, the said Mason and Owen gave him a receipt. That the petitioner, on said date, instructed the said Mason and Owen to send said shares of stock to the firm of Logan and Bryan in the City of New York, to be held by said Logan and Bryan subject to the order

of petitioner, and at the same time requested the said Mason and Owen to obtain from the said Logan and Bryan an acknowledgment in writing that they had received from the said petitioner the said stock to be held by them, subject to the order of said petitioner.

That the said Mason and Owen accepted the said stock with the distinct understanding and agreement that they would forward said stock to the said firm of Logan and Bryan, under the instructions hereinabove set forth.

Petitioner further states that he has been informed and believes, and on that ground alleges, that the said Mason and Owen did send said stock to the said firm of Logan and Bryan and that the said firm of Logan and Bryan received said stock and now has the same intact in their possession.

That on the 22nd day of November, 1920, petitioner demanded of and from Logan and Bryan the return of said stock to him, and on the 23rd day of November, 1920, demanded of the said Mason and Owen the return of said stock to him, but the said Logan and Bryan and the said Mason and Owen have refused and still refuse to return the said stock to petitioner, and continue to retain possession of the same, and the whole thereof.

Petitioner further states that prior to said dates, nor since said dates, or at all, has he had any business dealing with the said Mason and Owen, nor has he ever purchased or negotiated for the purchase of any stock

with them, or at all, nor has he ever had any account of any kind or description with the said Mason and Owen, and that the said stock was delivered to the said Mason and Owen solely for the purpose of sending it to New York to the said Logan and Bryan, to be held subject to the order of the said petitioner, and not otherwise.

That petitioner has never parted with the title to the same, or authorized anyone to use, sell or contract for the sale of said stock, or any part thereof, and that said petitioner, prior to said dates, and ever since has been, and is now, the owner and entitled to possession of said shares of stock.

WHEREFORE, petitioner prays that this Honorable Court make an order directing the said Mason and Owen and the said Logan and Bryan to re-deliver to petitioner the said shares of stock, and the whole thereof, forthwith.

Patterson Sprigg
Attorney for petitioner

Joseph F. Birch, Jr.
Petitioner

STATE OF CALIFORNIA)
)SS.
COUNTY OF SAN DIEGO)

Joseph F. Birch, Jr., being first duly sworn, deposes and says:

That he is the petitioner herein; that he has read the foregoing petition; that he knows the contents thereof, and the same is true of his own knowledge,

except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

Joseph F. Birch Jr

Subscribed and sworn to before me this 14th day of January, 1921.

Patterson Sprigg

Notary Public in and for the County of San Diego, State of California.

(Seal.)

[Endorsed]: IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. IN THE MATTER OF MASON & OWEN, Bankrupts. PETITION FILED APR 21 1921 at 30 min. past 3 o'clock P M CHAS. N. WILLIAMS, Clerk Douglas Van Dyke Deputy Patterson Sprigg Attorney for Petitioner, Attorney at law Suite 512 Southern Title Building San Diego, California

FILED This 14 day of Jan 1921 at 30 minutes past 3, P. M. Edward T. Lannon Referee in Bankruptcy.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

IN THE MATTER OF MASON)
(STIPULATION.
AND OWEN, Bankrupts.)

IT IS HEREBY STIPULATED AND AGREED by and between WILL J. THAYER, Esq., Trustee for Mason & Owen, and PATTERSON SPRIGG, esq., attorney for Joseph F. Birch, Jr., that the recitations hereinafter set forth shall constitute the facts to be submitted to the referee in bankruptcy for his determination of the rights of the said Joseph F. Birch, Jr., to his claim for stock, as set forth in his petition herein filed, as follows:

- I -

That said petition of the said Joseph F. Birch, Jr., was filed with the referee in bankruptcy on or about the 14th day of January, 1921, and that the said trustee for Mason & Owen duly received a copy of said petition.

- II -

That on or about November 3rd, 1920, the said Joseph F. Birch, Jr., was the owner, in possession and entitled to the possession of certificates of stock number 69806, 69807, and 69898, representing three hundred shares of stock in the Ray Consolidated Copper Company.

- III -

That on said last named date the said Joseph F. Birch, Jr., delivered said stock, endorsed by him in blank, to Mason & Owen, who were stock brokers in the City of San Diego, California, with oral instructions to said Mason & Owen to send said stock to the correspondents of Mason & Owen in New York City, Messrs. Logan & Bryan, and to obtain from said Logan & Bryan an acknowledgement in writing that they had received said stock from said petitioner, to be held by the said Logan & Bryan subject to the order and directions of the said Joseph F. Birch, Jr. That at the same time and place the said Joseph F. Birch, Jr., received from Mason & Owen the receipt hereto attached and *market* Exhibit "A", and delivered to them the writing hereto attached and *market* Exhibit "B". That said Mason & Owen thereupon mailed said certificates of stock to the said Logan & Bryan and paid thereon $1.26 insurance and for conveying said stock while in transit, and thereafter, on November 4th, 1920, sent to the said Birch a bill for the said charge of $1.26, which bill or statement is hereto attached, marked Exhibit "C".

That the said Mason & Owen made entries on their books as will be shown by Exhibit "D", hereto attached.

- IV -

That previous to November 20th, 1920, the said Mason & Owen were indebted to the said Logan and Bryan in the sum of about Two Hundred Six Thous-

and, Fifty-four & No/100 ($206,054) Dollars, and prior to said last named date the said Mason & Owen sent to the said Logan & Bryan the said three hundred shares of stock, the property of the said Joseph F. Birch, Jr, together with a large number of shares of stock belonging to customers of said Mason & Owen with the intention on the part of Mason & Owen to pledge same under the terms of said Ex. B, and all of the said stock was held by said Logan & Bryan as security for the payment of the said indebtedness to them of the said Mason & Owen.

- V -

That thereafter such proceedings were had as resulted in the sale of a portion of the said stock, by the said Logan & Bryan (the said stock so sold did not include the stock of the said Joseph F. Birch, Jr.), for the purpose of paying the amoun*d* due the said Logan & Bryan, which said payment was made in full on or about December 8th, 1920, out of the proceeds of the sale of said stock, which left the said petitioner's stock (Joseph F. Birch, Jr.) unsold and in the hands of the said Logan & Bryan; that the said Logan & Bryan make no claim to the said stock and the title to the same is now and always has been in the name of said Joseph F. Birch, Jr.

- VI -

That the market value of all of the stock sent by the said Mason & Owen and held by the said Logan & Bryan, was Three Hundred Thirty-nine Thousand, One Hundred Fifty-six ($339,156.00) Dollars, and

the value of the said stock owned by the said Joseph F. Birch, Jr., to-wit, the three hundred shares of the Ray Consolidated stock was, at said time, $-----

IT IS FURTHER STIPULATED AND AGREED by the parties hereto that the said Joseph F. Birch, Jr., prior to said date, nor since said date, nor at all, has had any business dealings, except as herein set forth, with the said Mason & Owen, nor has he ever purchased or negotiated for the purchase of any stock with them, and that the said stock of the said Joseph F. Birch, Jr., was delivered to the said Mason & Owen solely for the purpose of sending it to the said Logan & Bryan to be held subject to the order of the said Joseph F. Birch, Jr., and not otherwise.

That the said Joseph F. Birch, Jr., has heretofore made written demand upon the said Mason & Owen and their attorneys and agents, and also upon the said trustee, for the delivery of said stock, and that they, and each of them, have refused and still refuse to deliver the same, or any part thereof, to the said Joseph F. Birch, Jr.

March 28th 1921

Will J Thayer
As Trustee for Mason & Owen.
Patterson Sprigg
Atty. for Jos. F. Birch Jr

Ex A

No———— San Diego, Cal., Nov. 3 1920
Received from Joseph F. Birch Jr cof #69806/808 for three hundred (300) shares Ray Cons in name Joseph F. Birch Jr

MASON & OWEN
Per Allen

$———

NOT NEGOTIABLE

Ex. B Nov. 3, 1920

MASON & OWEN SUCCESSORS TO GEO. G. PRENTICE & CO. COMMISSION MERCHANTS STOCKS—BONDS—GRAIN Grant Hotel Building San Diego, California. Code Bird

Correspondents of LOGAN & BRYAN Direct private wire to all exchanges Gordon Prentice Manager

Mason & Owen, 1032 Fourth Street, San Diego, Calif. Gentlemen:—I hereby consent: First: That all transactions heretofore or hereafter made by you for my account are subject to the rules, regulations and customs of the New York Stock Exchange and its Clearing House,; or the rules, regulations and customs of the Exchange or market upon which any transaction by my order is made for my account.

Second: That all securities, evidences of indebtedness or other property now or hereafter carried in my account or *or* deposited to protest the same, may be loaned or pledged by you, either, separately or together with other securities belonging to others, either for the sum due thereon or for a greater sum; that said securities, evidences of indebtedness or other property may be transferred to your own account on the books of the corporation, may be sold by you, either in whole or in part, without notice to the undersigned, at any time when in your judgment the margin of protection in my account shall become impaired to a point where you deem it unsafe to carry it longer, such sale to be

made at public, brokers' board or private sale, less the brokerage or other expenses of said sale, to be placed to the credit of the undersigned as an offset against the debit in my account.

Furthermore you shall not be required to return to me the identical bonds or other securities deposited by me or carried in my account, it being understood that bonds or securities of like kind can be returned to me. It is the purpose of this letter and consent to give to you, and I hereby expressly give, the consent provided for in Section 956, Subdivision 2, of the Penal Code, as added by Chapter 500 of the Laws of 1913 of New York. Very truly yours Jos. F. Birch Jr Signature

Dated Nov. 3 1920 In the presence of C F Mason

[Endorsed]: 4165 Bkcy Mason & Owen Bankrupts Refs. Certif on Review and exhibits. Filed April 21 - 1921 at 5 Min. Past 5 P. M. Chas. N. Williams Clerk R. S. Zimmerman Deputy.

Ex. C

MASON & OWEN Successors to
GEORGE G. PRENTICE & CO.
Commission Merchants
Grant Hotel Building
San Diego.....Cal. San Diego, Cal., Nov. 4 1920
Mr Jos F Birch Jr

This day we charge your stock account $1.26 Insurance to N. Y

MASON & OWEN Successors to
E. & O. E. Geo. G. Prentice & Co. By O

H. P. Nov. 3, 1920. Stock account of Joseph F. Burch, Jr "Bird" Ex. "D"
Tallman, Robbins & Company."Bird" Address
Chicago-New York

Date	Securities		Description	Price	Folio	Debits	Credits	Balance	
1920	Long	Short						Dr.	Cr.
Nov 4	300		Ray Cons to N. Y as of Nov 3			126			
"			Insurance " "				126		
30			Balance						
						126	126		
Nov 30	Long		Balance			126			
	300		Ray Cons						
Dec 14			Balance				126		
						126	126		
14	Long		Balance			126			
	300		Ray Cons						
Dec 31			Bal				126		
						126	126		
1920									
Dec 31	Long		Balance			126			
	300		Ray Cons						
1921									
Jany 10			Div 200 Ray Cons				5000		

(The name "Logan & Bryan" is printed on the top of the original bookkeeping sheet.)

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

In the Matter of C. F. Mason & Wm. McD. Owen, co-partners trading as Mason & Owen, Bankrupts.) 4165 Bkcy (ORDER

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Edward T. Lannon, Esq., of San Diego, California, referee in Bankruptcy

The trustee of Mason & Owen, Bankrupts, and his attorney Will J. Thayer, Esq.,

Patterson Sprigg, Esq., attorney for claimant, Jos. F. Birch, Jr.

--- ORDER ---

The above entitled matter coming on to be heard upon the application of Jos. F. Birch, Jr. for the delivery to him of 300 shares of Ray Consolidated Copper Co. Stock, represented by certificates numbered 69806, 69807, 69808.

That said stock is, and was the property of said Birch at the time, to-wit, on or about November the 3rd, 1920, when the said Birch delivered the same to the said Mason & Owen to be sent to Logan & Bryan, brokers in New York for the use and benefit of said Birch.

It is now Ordered by the Court that Messrs. Logan & Bryan, if they still retain possession of the said stock, or the trustee herein, if he now has possession of said stock are, and each of them is, directed to

deliver to the said Jos. F. Birch, Jr., or his order, the said 300 shares of Ray Consolidated Copper Co. stock, together with all accrued dividends thereon, received and retained by said Logan & Bryan and by said trustee, or by either of them.

Bledsoe

Judge of the District Court of the U. S. in and for the Southern District of Calif. Southern Division

Los Angeles, Calif., March 6 1922.

[Endorsed]: 4165 Bk In re Mason & Owen Bkpts. Order re 300 Shares Ray Consolidated Stock FILED Mar - 7 1922 at 20 min. past 11 o'clock A. M. CHAS. N. WILLIAMS, Clerk R. S. Zimmerman, Deputy

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IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In Bankruptcy - #4165.

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts,	ASSIGNMENT OF ERRORS ON APPEAL FROM BURCH ORDER.
C. F. MASON and WM. McD. OWEN, Bankrupts.	

Now comes George P. Kier, as Trustee for said Bankrupts, and files the following assignment of errors

upon which he will rely upon his prosecution of the appeal in the above entitled cause, from the order and decree referred to in his petition for appeal.

I.

That the above named court erred in granting the petition of Joseph F. Burch, Jr., on file herein, praying for the delivery to him of 300 shares of stock of the Ray Consolidated Copper Company.

II.

Said court erred in directing the delivery to said Burch of said shares of stock, or any of them.

III.

Said court erred in directing the payment or delivery to said Burch of any dividends in any amount whatsoever.

WHEREFORE, appellant prays that said order and decree be reversed in all things and that said District Court be ordered to enter a decree reversing its aforesaid decision in all things.

Dated: This 13th day of March, 1922.

Will J. Thayer

Attorney for said Trustee,
George P. Kier.

[Endorsed]: In Banrkuptcy - #4165 UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION. In the Matter of C. F. MASON, and WM. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts, C. F. MASON and WM. McD.

OWEN, Bankrupts. ASSIGNMENT OF ERRORS ON APPEAL FROM BURCH ORDER. FILED MAR 15 1922 CHAS. N. WILLIAMS, Clerk By Douglas Van Dyke Deputy Clerk Will J. Thayer, Attorney for George P. Kier, Trustee, 462 Spreckels Bldg., San Diego, Calif.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts, C. F. MASON and WM. McD. OWEN, Bankrupts.	In Bankruptcy - #4165) (STIPULATION FOR RECORD ON APPEAL (BURCH).

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It is hereby stipulated by the undersigned as follows:

1. That the appeal taken herein by the Trustee, George P. Kier, from the order entered in favor of Joseph F. Burch, Jr., and any writ of review which may be hereafter issued to review said order, shall be heard and decided by the United States Circuit Court of Appeals for the Ninth Circuit, upon the statement of facts as herein agreed upon.

2. That said District Court heard and disposed of the controversy over the stock hereinafter mentioned on the facts as herein stated, said facts being as

follows, and are hereby stipulated to comprise the record on appeal.

(a) The petition of Jos. F. Birch, Jr., filed with the said Court on or about the 14th day of January, 1921, in which he set forth his claim to certificates number 69806, 69807, 69808, for 300 shares of stock in the Ray Consolidated Copper Company.

(b) The stipulation dated March 28th, 1921, signed by Will J. Thayer, the then Trustee, and Patterson Sprigg, Esq., Attorney for Joseph F. Burch, Jr., together with Exhibits A, B, C, and D, which accompany said stipulation, said stipulation and exhibits to be printed in the transcript as a part thereof.

(c) That the stock referred to in said stipulation actually reached Logan & Bryan on November 9th, 1920, and they still retain possession of same.

(d) That the indebtedness due from Mason & Owen to Logan & Bryan amounted to $330,778.87 on November 9th, 1920, but was reduced to $208,338.09 by December 1, 1920, which was the date on which the petition was filed to declare Mason & Owen bankrupts, and they were adjudicated bankrupts on December 20, 1920, and their trustee was appointed on January 4th, 1921.

(e) That the market value of said shares of stock on December 1st, 1920, date on which bankruptcy proceedings were filed, was $3,375.00, and on December 8th, 1920, was $3,562.50.

(f) That at the sale referred to in Paragraph 5 of said Stipulation of March 28th, 1921, sufficient of

the stocks, or securities, of customers of Mason & Owen which had been purchased by them on margin was sold to produce, and which did produce, over $300,000.00, out of which the indebtedness to Logan & Bryan was paid in full and the balance, over $100,-000.00, was remitted by Logan & Bryan to the Trustee for said bankrupts. That twenty-one securities were not sold, and survived the liquidation, including the 300 shares of Ray Consolidated Stock claimed by Burch, and demand made therefor upon Logan & Bryan and upon the Trustee of Mason & Owen, prior to December the 1st, 1920. That all of said twenty-one securities had been fully paid for to Mason & Owen, including the 300 shares of Ray Consolidated Stock.

(g) The order of Judge Bledsoe directing the delivery to Joseph F. Burch, Jr., of the stock referred to in said stipulation.

(h) The assignment of errors filed by said Trustee.

3. That the foregoing were the facts and all the facts on which this case was tried and decided in the District Court, and the same shall comprise the record on appeal or review.

DATED: July 25th, 1922.

Patterson Sprigg,

Attorney for Joseph F. Burch, Jr.

Will J Thayer

Attorney for George P. Kier, as Trustee for said Bankrupts.

The foregoing stipulation is approved
Bledsoe

_____

Judge

[Endorsed]: In Bankruptcy #4165 DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION In the Matter of C. F. Mason and Wm. McD. Owen, co-partners, trading as Mason & Owen, Bankrupts, C. F. MASON and WM. McD. OWEN, Bankrupts. STIPULATION FOR RECORD ON APPEAL (BURCH) FILED JUL 26 1922 at 10 min. past 4 o'clock P. M. CHAS. N. WILLIAMS, Clerk Louis J. Somers, Deputy PATTERSON SPRIGG Attorney for Joseph F. Burch, Jr. 512 Southern Title Bldg. San Diego, California.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In Bankruptcy - # 4165.

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts,	PRAECIPE FOR RECORD ON BURCH APPEAL.
C. F. MASON and WM. McD. OWEN, Bankrupts.	

To the Clerk of the above named Court:—

You are hereby requested to prepare a transcript of the record for use on the appeal taken by George P. Kier, as Trustee, from the order dated March 6th, 1922, granting the petition of Joseph F. Burch, Jr., the following papers:—

1st:—The petition filed by Burch, dated January 14th, 1921.

2nd:—The stipulation dated March 28th, 1921, together with the attached exhibits.

3rd:—The order dated March 6th, 1922, granting the Burch petition.

4th:—The assignment of errors, filed by the Trustee.

You are further requested to incorporate in the record the following statement of the evidence:

"The undisputed testimony showed that the said 300 shares of stock were received by Logan & Bryan on November 9th, 1920; That on said date Mason & Owen were indebted to Logan & Bryan in the sum of $330,778.87; That on December 1, 1920, said indebtedness was $208,338.09; That the value of said stock on December 1st, 1920, was $11.25 per share and its value on December 7th, 1920, was $11 7/8 per share."

The Trustee further states that the error relied upon in the said appeal is that the Court erred in directing the delivery to said petitioner of the stock and dividends mentioned in the aforesaid order, or any part of same.

There should also be transmitted with the record a copy of the two opinions of the Court in reference to the petition of said Burch.

Dated: April 24th, 1922.

Will J. Thayer

Atty. for George P. Kier, Trustee.

[Endorsed]: In Bankruptcy - #4165. District Court, United States, Southern District of California, Southern Division. In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts, C. F. MASON and WM. McD. OWEN, Bankrupts. PRAECIPE FOR RECORD OF BURCH APPEAL. Copy of the within Praecipe received, this 24th day of April, 1922.

Patterson Sprigg Attorney for Appellee. FILED APR 25 1922 at 30 min. past 12 o'clock P. M. CHAS. N. WILLIAMS, Clerk Murray E. Wire Deputy Will J. Thayer, attorney for George P. Kier, as Trustee. # 462 Spreckels Bldg., San Diego, Calif.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN, Bankrupts.	)))))	CLERK'S CERTIFICATE.
C. F. MASON and WM. McD. OWEN, Bankrupts.	)))	

I, CHAS. N. WILLIAMS, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 23 pages, numbered from 1 to 23 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the petition, stipulation with exhibits, order, assignment of errors, stipulation for record and praecipe.

I DO FURTHER CERTIFY that the fees of the Clerk for comparing, correcting and certifying the fore-

going Record on Appeal amount to
and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this day of August, in the year of our Lord One Thousand Nine Hundred and Twenty-two, and of our Independence the One Hundred and Forty-seventh.

CHAS. N. WILLIAMS,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 3913

In The

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

JOSEPH F. BURCH, JR.,

Appellee.

Appellant's Brief

Upon Appeal from the United States District Court for the Southern District of California, Southern Division

WILL J. THAYER,
1530 Spreckels Building, San Diego, California
Appellant's Attorney.

Frye & Smith, Printers, San Diego, Cal.

In The

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN,

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

JOSEPH F. BURCH, JR.,

Appellee.

Appellant's Brief

This is a reclamation proceeding in bankruptcy begun by the petitioner to recover from the trustee in bankruptcy 300 shares of stock of the Ray Consol. Copper Company. From an order in petitioner's favor awarding him possession of the stock the trustee in bankruptcy appeals.

STATEMENT OF THE CASE.

On November 3, 1920, petitioner was the owner of three certificates of stock of the above named company,

representing 300 shares, and on that date delivered them, endorsed in blank, to Mason & Owen, stockbrokers, and at the same time gave them written authority to pledge the shares for any sum that they saw fit.

Mason & Owen immediately pledged the shares to Logan & Bryan to secure their general indebtedness. The shares reached Logan & Bryan on November 9, 1920, at which time said indebtedness amounted to $330,778.87, but was subsequently reduced so that at the time of bankruptcy the amount was $208,338.09. (Record, p. 7.)

In addition to pledging petitioner's stock Mason & Owen also pledged to Logan & Bryan a large number of shares of stock belonging to their other customers and it was stipulated as one of the facts in this case that, *"all of the said stock was held by Logan & Bryan as security for the payment of the said indebtedness to them of the said Mason & Owen."* (See Stipulation, Record, p. 8.)

The value of all of the pledged stocks held by Logan & Bryan was $339,156.00 (Record, p. 8) and the value of petitioner's stock was $3,375.00 (Record, p. 17).

The written authority given by petitioner to Mason & Owen to pledge his stock will be found on p. 10 of the Record, the relevant portion of it being as follows:

> "That all securities * * * now or hereafter carried in my account * * * may be * * * pledged by you either separately or together with other securities belonging to others, either for the sum due thereon, or for a greater sum."

The word account is defined in *Frutig* vs. *Trafton*, 2

Cal. App., 47 (49) and it is plain that petitioner's shares were carried in his account with Mason & Owen. (See exhibits on pp. 9, 11 and 12 of the Record) so that the authority to pledge clearly covered the shares in question.

After bankruptcy proceedings were begun and on December 8, 1920, a sale of a portion of the stocks belonging to Mason & Owen's customers was made which sale produced enough money to pay Logan & Bryan in full, leaving a number of shares unsold, among them being those belonging to the petitioner. (Record, pp. 8 and 18.)

The stocks first sold were those which had been purchased by margin customers and the petitioner claims that his stock should now be delivered to him free and clear and that the owners of the other stocks should stand the entire expense of paying off the indebtedness of Mason & Owen to Logan & Bryan, notwithstanding the fact that he consented to the pledge of his shares to secure that indebtedness.

POINTS AND AUTHORITIES.

The argument naturally divides itself into two parts:

1st. Did the written authority executed by petitioner authorize the pledging of his stock.

2nd. If it did, then must he contribute to paying off Logan & Bryan's lien.

THE WRITTEN AUTHORITY CONFERRED POWER TO PLEDGE THE STOCK.

The written authority (Record, p. 10) in paragraph second thereof gave the right to do two things, viz., (a) to *pledge* the stocks referred to or (b) to *sell* same.

The power to *sell* was coupled with certain conditions and could be exercised only in the event that the marginal protection became impaired. The power to sell was not exercised and need not be considered further.

The power to *pledge,* however, unlike the power to sell, was *unconditional. It was not limited in any manner or by any words whatever.* Mason & Owen were simply given unlimited authority to pledge petitioner's stocks "either for the amount due thereon or for a greater sum." Mason & Owen had a broker's lien on the stocks for all advances made by them on petitioner's account.

9 Corpus Juris, p. 665.

The only amount actually due to them from petitioner was $1.26 for insurance on the stock to New York (Record, p. 11, Exhibit C), but the written authority is very explicit in giving Mason & Owen power to pledge the stock "for a greater sum". (Record, p. 10.)

We submit, therefore, on this branch of the case that petitioner did consent to the pledging of his stock and the stock *was* pledged. Being a valid pledge for a valid indebtedness the petitioner cannot recover the pledged stock without paying, or offering to pay, the indebtedness for which it was pledged.

The petitioner manifestly could not have recovered his stock from Logan & Bryan before the indebtedness due to Logan & Bryan had been paid off.

That, we presume, will be conceded.

The only theory then, on which petitioner can recover is that he had the right to require the stocks of the other customers of Mason & Owen to be sold in order to save

him harmless, and that contention presents the principal question in this case.

Before discussing that theory we wish to propound this query to appellee: If an action had been begun before the sale by all the customers for the purpose of redeeming the pledged stocks from Logan & Bryan's lien, would not all stocks which were pledged with the consent of the owners thereof have been obliged to bear their proportionate part of the payment to Logan & Bryan?

The above question must necessarily be answered in the affirmative.

This being so, the next question is whether the petitioner is in any better position by reason of the facts that the sale was made after bankruptcy and that it was not necessary to sell all of the stocks in order to pay off the pledgee and that some of the stocks fortuitously survived the sale.

AFTER INSOLVENCY ALL STOCKS UNDER PLEDGE MUST CONTRIBUTE RATABLY.

We contend that *after* bankruptcy occurs all stocks pledged for a common debt must contribute ratably, and that no preference will be given any particular stock because of the fact that the stocks first sold produced enough money to discharge the entire indebtedness.

This identical question was before the court in *Re Wilson,* 252 Fed., 631 (639), where it was said of a similar case:

> "It is true that the court held that the admiralty principle of general average was not applicable, and that the pledge should not be treated as a common

adventure; but it did not disturb the proposition that it is the character of the equity which determines how any particular claim shall be classified. The case is quite different from one where a pledgee rightly sells collateral *prior* to a bankruptcy. In the absence of fraud or collusive arrangements, the result of such a sale is one of the hazards which may befall persons in a business of this character. If, however, it be held that, *after a petition in bankruptcy has been filed,* the pledgee, by selecting for sale some stocks and not others, can thereby save some stocks intact for the owners without the burden of contribution, and not others, it can readily be seen that the door will be opened for the most indefensible kind of favoritism, and possibly for corrupt bargains between the owners of securities and the pledgee. Indeed, a pledgee of his own motion, without any agreement with owners of securities, could easily safeguard his friends to the detriment of others who were strangers to him." (Our italics.)

In *Whitlock* vs. *Seaboard Nat'l Bank,* 60 N. Y. Supp., 611, it appeared that a broker had pledged customers' securities and the pledgee sold sufficient thereof to satisfy its claim, leaving three securities unsold, and the question arose whether the unsold securities must contribute to the removal of the burden of the loan, and the court said:

"As these several owners, though dealing with Cuthbert separately, became involuntarily involved in common in the payment of his indebtedness to the bank by the burden laid upon their several securities for one common debt, their separate relations as against Cuthbert, (the broker) became changed into a *common co-suretyship* for him with the bank to the extent, relatively that their property was forced to pay his obligations. What, then

are the several rights of those entitled to the balance left? As against Cuthbert, and the bank itself, when satisfied, each owner has the right to follow his property, and appropriate any specific items left on hand as his own, and, if converted into money, has the right to the proceeds of that property. *As to his co-sufferers, however, a different rule prevails.* Equitable considerations govern the relations of sureties toward their co-sureties, as well as towards the principal debtor and creditor. The securities here first sold were the vanguard of the contest, and bore the brunt of the advance sacrifice, thus shielding the other stocks and any balance of money left after the sale. *The rights of the sureties as between themselves were fixed by the insolvency of the broker* and the necessity of a sale to free the whole of the property from the unwarranted act of the person to whom it was first pledged. *Those rights could not be changed or determined by any hazard of chance in the order of sale, or by any selection of the pledgee bank.* The right of redemption existed to relieve that burden, and, if all the sureties had united for that purpose, so that the bank was obliged to accept the full sum tendered, the several contributions would have been rated proportionately to the extent of the loss or injury." (Our italics.)

In a recent case (*Unangst* vs. *Roe*, 177 N. Y. Supp., 706 (712) the court said on this same point:

"The rights of the parties between themselves *became fixed when the brokers made their assignment and the trust company was compelled to resort to the collateral deposited as security.* All of that collateral was subject to the same obligation and lien, and its owners as co-sureties were entitled then to contribution from each other for any loss sustained. *Their rights could not be changed or determined by any hazard of chance in the order of sale* or by any selection of the pledgee bank. It

follows that the defendant could gain no advantage by the delivery of the stock to him and must account for its value to his co-sureties." (Our italics.)

We therefore submit on this branch of the case that the court should not show any favoritism by picking out the stock of any particular owner and directing it either to be sacrificed or saved, but that *equal treatment will be accorded all the owners.*

We submit, then, that the petitioner stands just as though all of the parties whose stocks were in the pledge had joined, or been joined, in an action to redeem the stocks from the pledgee, in which event equal treatment would have been accorded to them all.

The petitioner particularly cannot claim that he was aggrieved by the pledge of his stock because he *specially authorized the pledge to be made.* His case is fully covered by Sec. 3515 of the Civil Code declaring that,—

"He who consents to an act is not wronged by it."

Whatever was done with his stock was done with his *consent* and surely he is in no position to demand that the other customers of Mason & Owen are obligated to shield him from the consequences of his own act.

It may be contended, however, that petitioner's equity is superior to those of his co-sureties because the latter had made marginal purchases.

We will notice that point briefly.

THE RIGHTS OF THE MARGIN CUSTOMERS ARE NOT INFERIOR TO THE RIGHTS OF THOSE WHO CONSENTED TO THE PLEDGE OF THEIR STOCKS.

The stipulation admits that these margin stocks be-

longed to Mason & Owen's customers (Record, 17-18) and we must therefore assume one of two things, viz., either that (a) the margin stocks were pledged rightfully or (b) that they were pledged wrongfully. If wrongfully pledged then petitioner's stocks should be sold first, because he consented to the pledge of his stocks; if the margin stocks are deemed to have been *rightfully* pledged i. e., with their owner's consent, (we may say in passing that there was no proof of any such consent) then a case is presented where all of the stocks were in the pledge with their owners' consent.

No matter which way we look at the situation petitioner must contribute his share.

If the stocks of the other customers were wrongfully in the pledge then their equities are superior to those of the petitioner because he consented to the pledge of his stocks and "he who consents to an act is not wronged by it" (Civ. Code, 3515) while if, on the other hand, the stocks of said other customers were rightfully in the pledge then *all* of the pledged stocks were *equally situated* and should receive equal treatment.

APPELLEE'S AUTHORITIES.

Appellee cited in the court below several decisions, among them being,—

Re Wilson, 252 Fed., 631;

Re McIntyre, 181 Fed., 955 (C. C. A.).

In the Wilson case the court stated the rule to be that "the extent of the wrong is the measure of the equity" (p. 650) and on the same page laid down the following rule:

> "As between securities hypothecated with authority and those hypothecated without authority, obviously the latter have the superior equity."

According to the above excerpt the equities of the other customers of Mason & Owen are superior to those of appellee because the latter's stock was hypothecated *with his authority*, and ought to be sold and the proceeds *entirely* exhausted before recourse is had to the stocks hypothecated without authority.

The other case cited by appellee and usually referred to as Pippey's case is not applicable to the case at bar because the stock there in question had been hypothecated *without* the owner's consent, and the court specifically stated that the hypothecation of Pippey's stock "was a *larceny* of his stock." (p. 958.)

The opinion in Pippey's case cites *Tompkins* vs. *Morton Trust Co.*, 86 N. Y. Supp., 520, but it is to be noted that the court in that case placed its decision on the same ground as the opinion in Pippey's case, viz., that the "use of this stock as collateral security for a loan was a *larceny* of the stock." (See p. 523 of opinion.)

The other decision cited in Pippey's case was *Kavanaugh* vs. *McIntyre*, 112 N. Y. Supp., 987, and the court said, "In short, the acts disclosed constituted *larceny*." (p. 992.)

We do not see how it can be contended that the above cases are precedents for the case at bar. In those cases the stockbroker had committed *larceny*. The stock, when located, was merely *stolen* property, which can always be reclaimed by its owner, but in the case at bar the stockbroker had been given specific authority to

hypothecate it. Certainly Mason & Owen could not be convicted of *larceny* for doing what appellee agreed they could do, *i. e.*, pledge his stock.

The cases cited by appellee in the court below can be distinguished from the case at bar by the fact that the claimant in those cases had not authorized the hypothecation of his stock while in the instant case the claimant had given authority to pledge.

AMOUNT OF CONTRIBUTION.

If Your Honors hold that petitioner's equity under the facts of this case is inferior to the equity of the other customers, then his stocks must be sold and the proceeds entirely exhausted before recourse is had to the other stocks.

If, however, it is held that the equities of said other customers are not superior to those of petitioner and that *all* of the stocks were rightfully in the pledge, then petitioner should simply stand his *pro rata* share of the common burden of the Logan & Bryan loan.

On the latter theory his share would be such proportion of the whole indebtedness as the value of his stocks bore to the value of *all* the stocks.

His stocks were worth $3,375.00, (Record, p. 17). All of the stocks were worth $339,156.00, (Record, p. 8), and the indebtedness was $208,338.09, (Record, p. 17). His contribution would therefore be such proportion of $208,338.09 as $3,375.00 bears to $339,156.00, or $2,083.38, plus interest at the rate of 7% per annum from the date when he should have made his contribution, i. e., the date of sale, December 8, 1920.

We therefore ask either that the claimant's petition be dismissed on the ground that his stocks should be held primarily responsible for the *entire* indebtedness, or that he be required to contribute his *proportion* of the indebtedness on the theory that "he who asks equity must do equity".

Respectfully submitted,

WILL J. THAYER,
Appellant's Attorney.

No. 3913

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts

C. F. MASON and WM. McD. OWEN,

Bankrupts

GEORGE P. KIER, Trustee

Appellant

JOSEPH F. BIRCH, Jr., Appellee

BRIEF OF APPELLEE

Upon appeal from the United States District Court, for the Southern District of California, Southern Division

PATTERSON SPRIGG,
Attorney for Appellee,
512 Southern Title Building
San Diego, California

WATSON-JONES, INC., PRINTERS, SAN DIEGO, CAL.

GENERAL INDEX

INDEX TO CASES CITED

No. 3913

IN THE

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In the Matter of C. F. MASON and WM. McD. OWEN, co-partners, trading as MASON & OWEN,

Bankrupts,

C. F. MASON and WM. McD. OWEN

Bankrupts,

GEORGE P. KIER, Trustee,

Appellant,

vs.

JOSEPH F. BIRCH, JR.,

Appellee.

BRIEF OF APPELLEE

Further Statement of Facts

In addition to the facts set out by appellant we would add:

On November 3, 1920 Birch was the owner and in possession of three certificates of 100 shares each of stock in the Ray Consolidated Copper Company, fully paid for, and on that date delivered them, endorsed in blank, to Mason & Owen, Stock Brokers, with oral instructions to Mason & Owen to send said stock to Logan & Bryan in New York City, and obtain from them an acknowledgment in writing that they had received said

stock from Birch and held the same subject to his order and instructions. (Record, Page 7 Par. -III-).

Receipt was given by Mason & Owen to Birch for said stock. (Record, Page 9).

On the same date Birch signed the pledge agreement Exhibit B (Record, Page 10) which provides.

> Second: That all securities.... now or hereafter carried in my account or deposited to protect the same, may be loaned or pledged by you, either, separately or together with other securities belonging to others, whether for the sum due thereon or for a greater sum; that said securities.... may be transferred to your account on the books of the corporation, may be sold by you, whether in whole or in part, without notice to the undersigned, *at any time when in your judgment the margin of protection in my account shall become impared to a point where you deem it unwise to carry longer.* (Our Italics)

This agreement pre-supposes that Birch must trade or become indebted on marginal trades to Mason & Owen before said agreement could become effective. It is a fact and so stipulated that Birch never purchased or negotiated for the purchase of any stock with Mason & Owen or had any business dealing of any nature except the delivery to Mason & Owen of said stock only for the purpose of sending it to Logan & Bryan to be held subject to the order of said Birch, and not otherwise. (Record, Page 9).

As said by Judge Bledsoe in his opinion of August 30, 1921,

> "It is in evidence that there were no marginal transactions had or authorized between Birch and

> Mason & Owen and Logan & Bryan, and it is in this wise apparent that there was no authority actually given to Mason & Owen to pledge the Copper Stock. In other words, the circumstances under which they were authorized to pledge the Copper Stock, to-wit, marginal trade transaction or the like between them and Birch never came into existence, so that while they had blanket authority to pledge the stock, the specific circumstance actually authorizing them to exert the authority, never came into being."

On November 20, 1920 prior to the filing of the petition in Bankruptcy Birch demanded his stock from Mason & Owen and from Logan & Bryan; the later holding said identical certificates of stock and still retain possession of the same though they make no claim to said stock, and the title to the same is now and always has been in the name of the said Joseph F. Birch, Jr. (Record, Page 8, Par. 5).

Petition in bankruptcy was filed December 6, 1920. Subsequently all stocks purchased from Mason & Owen on margin was sold by Logan & Bryan under order of Court to satisfy the indebtedness of Mason & Owen to Logan & Bryan, the proceeds of said sale of marginal stock more than paid all of the Mason & Owen indebtedness to said Logan & Bryan, and the marginal stock were the only ones sold by Logan & Bryan to liquidate their claims. (Record, Pages 17 and 18 f).

Twenty-one securities, including the three hundred shares of Ray Consolidated stock, all fully paid for, and with no trade pending thereon, were not sold but survived the liquidation. (Record, Page 18 f).

The 300 shares of Ray Consolidated stock at the time of bankruptcy was the only Ray Consolidated stock held by Mason & Owen, or Logan & Bryan for said Mason & Owen, and no one other than Birch make any claim to Ray Consolidated on the books of Mason & Owen. No claim has been filed against Mason & Owen for Ray Consolidated by any other person than Birch.

All stocks in the hands of Logan & Bryan, prior to the bankruptcy, was held by them as pledged to secure the indebtedness of Mason & Owen to them. Among these they held the 300 shares of Ray Consolidated, so pledged, but without authority or consent from Birch, and without his knowledge. (Record, Page 9).

ARGUMENT

Appellant seems to base his application for reversal of the order of the District Court upon the theory that Birch signed unconditional authorization to Mason & Owen to pledge his stock "for any sum that they saw fit" admitting at the same time that Birch had no dealings with Mason & Owen other than the delivery to them of his certificates of stock to be sent to Logan & Bryan for his use and benefit, (Record, Page 9). The conditions in the so-called pledge agreement are that there must be marginal trading and that the account of the trader must be impared, or reduced to warrant the pledge of securities. In the present case neither condition existed, and the pledge of the Birch stock by Mason & Owen was larceny pure and simple, as having been pledged without the consent or knowledge of Birch. The Pip-

pey case at page 958 In re McIntyre 180 Federal 955 is wholly in point.

The 300 shares of Ray Consolidated Stock is *sufficiently identified*, since at the time of the bankruptcy there was in the hands of Logan & Bryan, to the credit of Mason & Owen, an equal amount of the same kind of stock and no one else claimed it (in fact the actual certificates numbered 69806, 69807 and 69808 representing 100 shares each of the said Ray Consolidated, and the identical certificates delivered to Mason & Owen by the said Birch. (Record, Page 17 c).

Gorman vs. *Littlefield*, 229 U. S., 19, at 24-25;

In re Solomon & Co., 268 Fed., 108;

In re Wilson, 252 Fed., 636, at 651.

Duel vs. *Hollins*, 241 U. S., 523, Syl.;

The identification is complete whether the said stock is in the hands of a pledgee, Logan & Bryan, or found in possession of Mason & Owen.

In re Wilson, 252 Fed., 639-654;

Spokane County vs. *First National Bank of Spokane*, 68 Fed., 979-983;

In re Royce, 143 Fed., 182.

In an unbroken line of decisions the Courts hold that "securities held by stock brokers as collateral to their customers accounts may, where the latter are not in-

debted to the brokers, be recovered by such customer from the Trustee in bankruptcy of the broker's Estate."

Thomas vs. *Taggart*, 209 U. S., 385, Syl. 3;

Gorman vs. *Littlefield*, 229 U. S., 19-25.

In the case of *Gorman* vs. *Littlefield*, *supra*, the stock was bought on the order of the customer, fully paid for, left in the broker's possession, found in the hands of the Trustees of the bankrupt broker, and was ordered by the Court to be delivered to the customer.

Richardson vs. *Shaw*, 209 U. S., 365.

In the case at the bar none of the marginal traders paid for their stock. All of their stocks were sold in order to liquidate the indebtedness to the pledgee, Logan & Bryan, and the marginal stocks more than paid that debt: (Record, Page 17-18) if the marginal traders had wished to save themselves any loss they could have paid up the amount due on their purchase, demanded their stock, and thus place themselves in a preferred class, the same as those who had paid for their stock in full before the bankruptcy. If the marginal stock did not pay the pledged indebtedness in full, the preferred holders of stock must share pro rata such deficiencies in in the amount of the pledged indebtedness, as was not covered by the pure marginal stock. In our case, however, the marginal stock fully paid Logan & Bryan, (the pledgee,) their entire indebtedness, and the Birch stock, with others paid in full survived the liquidation.

This position is fully set forth in re Wilson, 252 Fed., 635-6, in what is known as the Rolph's claim. There

the Class "A" creditors were those whose stock was fully paid for, and Class "B" the pure marginal traders, exactly the position in the case at bar but with this difference, that in our instant case there is no deficiency to be shared by the preferred or Class "A" claimants. All the pledgee's debt was paid out of the marginal stock so there is no debt to be shared by the Ray copper stock and the other twenty paid-in-full stocks which survived the liquidation by the pledgee, while in the Rolph claim (Wilson case) there was not sufficient of the marginal stock when sold, to pay the pledge so that the Class "A" or preferred claimants had to share the defficiency and Rolph received his stock but had to pay in the value of his stock and share in the Class "A" claims in proportion to the amount he paid in and that the Class "B" lost their whole margin on which they were gambling for a rise in market, Class "A" sharing only what debt to pledgee was not paid by Class "B".

In a recent case in this Court, No. 3844, wherein the same parties were appellants as in the case at bar, and one J. E. Steer was the appellee, this Honorable Court reviewed the facts therein and the decisions applicable thereto, wherein Steer made claim for 100 shares of Midvale Steel Stock, and this Court affirmed the order of the District Court.

We believe that the equities of the appellee, Joseph F. Birch in this case, are superior to the equities of the said J. E. Steer, for the reason that there are no complicated facts. Birch owned the Ray Consolidated Stock, fully paid for, when delivered to Mason & Owen on Novem-

ber 3, 1920, to be sent to Logan & Bryan, to be by them held for his use and benefit. Birch was never a trader with Mason & Owen. Mason & Owen pledged the Birch stock with Logan & Bryan, with other stock, to secure their debt without authority or the knowledge of Birch. We respectfully submit the conclusions reached in the Steer case will apply to the case at bar, and as the Court said therein, "generally the rule of decision is where stock certificates have been delivered to a broker as security for trades, but without authority to pledge, and where there is no trade pending and the stock has been pledged by the broker, if the loan has been liquidated and it has not been necessary to sell the stock in order to satisfy the debt for which it was pledged, the customer may recover."

In re McIntyre, 181 Fed., 955, 958;

In re Graff, 117 Fed., 343;

Kean vs. *Dickenson*, 152 Fed., 1022.

APPELLANT'S AUTHORITIES.

Appellant has referred in his brief to three cases as follows:

In re Wilson, 252 Fed., 631, (639);

Whitlock vs. *Seaboard Nat'l Bank*, 60 New York Supp., 611;

Unangst vs. *Roe* 177 New York Supp., 706, (712), claiming that they support his contention that all stock pledged whether rightfully or wrongfully, must contribute ratably.

These cases hold where the pledged securities are of the same class, it would be inequitable to select for sale

some stock and not others, thereby saving the unsold-stock for the owners, without the burden of contribution, as said in the Wilson case. We do not question the logic or equitable conclusion of these cases, we do say however, they have no application to the case at bar; here, the Birch stock was fully paid for, delivered to Mason & Owen for a special purpose and by them pledged without the knowledge or the consent of Birch to secure their personal debt; appellant justifies this, upon the assumption that Birch gave general authority to pledge his stock, this construction of the so-called pledge agreement is as fallacious as the assumption that Mason & Owen did not know they were misappropriating the Birch stock, when, on the same day they received it, they sent it to Logan & Bryan to secure their personal debt.

Appellant's claim, that the Birch stock should contribute with the marginal stock to the payment of the debt of Mason & Owen, upon the theory that there was a general authorization by Birch to pledge his stock, is based upon such false premises, that it is hardly believable that one could so misinterpret the English Language.

In view of the unbroken line of bankruptcy cases here cited and the failure of appellant to cite a single bankruptcy case contrary to the well-established equitable principle governing the case at bar, it is hard to escape the conclusion that appellant has indulged in a frivolous appeal from the order made by the District Court; this comes with greater force in the face of the ruling of this Court in the Steer case decided June 19th, 1922.

We submit that the order of Judge Bledsoe made March 6th, 1922, for the delivery to us of the stock, and all the accrued dividends should be affirmed.

Most Respectfully,

PATTERSON SPRIGG,

Attorney of Appellee.